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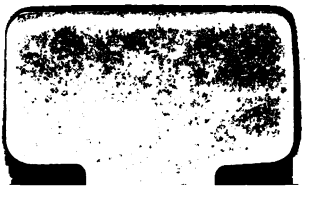
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A

TREATISE

ON

Copyholds,

CUSTOMARY FREEHOLDS,

ANCIENT DEMESNE,

AND THE JURISDICTION OF

COURTS BARON AND COURTS LEET.

BY

JOHN SCRIVEN,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

THE SECOND EDITION,

CONSIDERABLY ENLARGED AND IMPROVED.



WITH

APPENDIXES

CONTAINING RULES FOR HOLDING

CUSTOMARY COURTS,

(Particularly with Reference to Plaints in the Nature of Real Actions)

COURTS BARON AND COURTS LEET;

PRECEDENTS OF

COURT ROLLS, DEPUTATIONS, AND COPYHOLD ASSURANCES;

AND ALSO

EXTRACTS FROM THE RELATIVE ACTS OF PARLIAMENT.

Scientiæ laus omnis in exercitatione consistit.

LONDON:

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TO

THE RIGHT HONOURABLE

SIR CHARLES ABBOTT,

LORD CHIEF JUSTICE

OF THE

COURT OF KING'S BENCH,

AND

THE RIGHT HONOURABLE

SIR ROBERT DALLAS,

LORD CHIEF JUSTICE

OF THE

COURT OF COMMON PLEAS,

THIS WORK

IS

(WITH THEIR LORDSHIPS' PERMISSION)

MOST RESPECTFULLY DEDICATED.

ADVERTISEMENT.

THE unavoidable delay in the publication of the Author's Treatise on the Tenure of Copyholds, Customary Freeholds, and Ancient Demesne, and the Jurisdiction of Courts Baron and Courts Leet, induces him to publish the second edition of his work on Copyholds in a separate Volume. The additional subjects will be given, upon a continuous system, in a second Volume, which is in the press, and will be completed in the course of a very few weeks.

PREFACE.

In the advertisement which accompanied the first edition of this tract, the Author took occasion to remark, that it was originally his intention to have confined himself to the practical observations and rules contained in that volume, but that he had been induced by the kind solicitations of many professional friends, to enter into a brief detail of the nature and origin of Copyhold Tenure, as forming an important and interesting part of our Code of Laws.

With what success the Author's past efforts have been attended, it is for the Profession alone to judge. Suffice it, on his part, to observe, that he feels the liberal reception of his former labours, as an imperative obligation to attempt a more extended *Theoretical Treatise* on the subject of Copyhold Tenure, anxiously designing to impart to it, throughout, the *practical* advantages resulting from his experience in Court Keeping, and from the many sources of information which have been opened to him, since the publication of the first Edition.

The same motive has induced the Author to present the Profession with a theoretical and practical treatise, (in continuation of the former work,) on the Tenure of Customary Freeholds,

and Ancient Demesne, and on the Jurisdiction of Courts Baron and Courts Leet. This will be found under two separate divisions, in the second volume.

The Author hopes that he shall not subject himself to the imputation of egotism by remarking, that, in his endeavour to contribute, however humbly, to the rich fund of information for which the Profession is so much indebted to the excellent treatises of Lord Coke, Sir William Scroggs, Mr. Kitchin, Mr. Watkins, &c., it has been his aim to collect every important authority, and all the legal learning which could illustrate his subject, and to lay the substance of the whole before the Public, under a practical arrangement. He trusts, also, that the extent of his plan, the intricacy of the subject, and, he may add, the novelty of some points which he has endeavoured to elucidate, will be considered as an excuse for the many imperfections which are inseparable from a publication, undertaken (as is generally the case in books of this nature,) at a period when important professional avocations allow but little opportunity, either for revising the manuscript or for correcting the press.

INNER TEMPLE,
31*st March*, 1821.

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ERRATA.

Page 113, line 13, *for* "It has been said," *read* "It is supposed."

—— 285, n. 298, towards the end, *for* "additional," *read* "conditional."

—— 388, line 15, *for* "more ancient entries," *read* "a long series of ancient rolls."

—— 399, fourth line from the bottom, *for* "direct," *read* "order."

—— 466, eighth line, *for* "him," *read* "his devisee."

—— 482, twelfth line, *dele* "at law."

—— 567, n. 118, *for* "1 East," *read* "16 East."

—— 595, n. 3, *dele* the reference to "The King *v.* The Marquis of Stafford," (which case is cited fully in the same note, p. 594).

A

Practical Treatise

ON

COPYHOLD TENURE,

AND

COURT KEEPING.

PART THE FIRST.

CHAP. I.

On the Nature and Properties of a Manor.(1)

A MANOR is defined to be *nomen collectivum et generale*, comprehending messuages, lands, &c.(2)

(1) There have been a variety of conjectures as to the etymology of the term *Manor*. Sir Edward Coke was of opinion, that the term was derived from the French word *Mesner*, signifying to govern or guide, because the lord of a manor had the guiding and directing of all his tenants within the limits of his jurisdiction. See his Copyholder § 31. (Tr. p. 51-2), where he says, "And this I hold the most probable etymology, and most agreeing with the nature of a manor: *for a manor in these days signifieth the jurisdiction and royalty incorporate, rather than the land or scite.*"

(2) Dy. 207. Lex Cust. 4. The following account of the origin of manors, is from Perkins's useful little treatise on the laws of England, particularly on the various branches of conveyancing, published in the reign of King Edward VI. [vide pref. to 10 vol.

and is the district or aggregate compass of ground, granted by the ancient kings of this realm to the lords or barons, with liberty to parcel the land out to inferior tenants, reserving such duties and services as they thought convenient, and with power to hold a court (from thence called the Court Baron,) for redressing misdemeanors, punishing the offences of their tenants, and settling any disputes of property between them.

Upon the creation of manors, the lords took as much as was necessary for the use of their families into their own hands, or demesnes, distributed other parts among their tenants, and the uncultivated residue was called the lord's waste. In some instances the greater barons granted out smaller manors to others, and then the seigniory of the superior baron, or lord paramount, was frequently termed an Honour.

Co. Rep.] "§ 670. And it is to know, that the beginning of a manor was when the king gave a thousand acres of land, or a greater or lesser parcel of land, unto one of his subjects, and his heirs, to hold of him and his heirs, which tenure is knights service at the least. And the donee did perhaps build a mansion-house upon parcel of the same land, and of twenty acres, parcel of that which remained, or of a greater or lesser parcel, before the statute of *quia emptores*, &c. did enfeoff a stranger, to hold of him and his heirs, as of the same mansion-house, to plow ten acres of arable land, parcel of that which remained in his possession, and did enfeoff another of another parcel, &c. to carry his dung unto the land, &c. and did enfeoff another of another parcel thereof, &c. to go with him to war against the *Scots*, &c. and so by continuance of time he made a manor, &c." And see Kitch. [3d Ed.] p. 7.

A manor cannot now be created, not even by the king himself, length of time being the very essence of a manor (3); and, as Sir Edward Coke expresses it, such things as receive their perfection by the continuance of time, come not within the compass of a king's prerogative; therefore the king cannot grant freeholds to hold by copy, nor create a custom: And, according to the same author, another cause why a common person cannot create a manor at this day, is, that a perfect manor cannot subsist without a perfect tenure (4); and as the statute of *quia emptores terrarum* (5) directs, that upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee of whom

(3) Bro. tit. Tenures, 102. cites 35 H. 8. 2 Roll. Abr. 120. (A). Kitch. 7. Lex Cust. 5. Cro. Eliz. 38-9, in *Morris* v. *Smith* and *Paget*, S.C. (called *Marshe* & *Smith*) 1 Leo. 26.; and see Co. Cop. s. 31. Tr. 53, where it is said, "If the king at this day will grant a great quantity of land to any subject, enjoining him certain duties and services, and withal willeth that this should bear the name of a Manor, howsoever this may chance to gain the name of a manor, yet it will not be a manor in the estimation of the law."

(4) Co. Cop. s. 31. Tr. 45 to 49.

(5) 18 Ed. 1. West. 3. c. 1, which statute extends only to grants in fee-simple; and when the whole fee is parted with under particular limitations, each particular tenant, as well as the remainder-man in fee, holds of the lord paramount. Co. Litt. 23. a. 43. b. 98. b. 143. a. 2 Inst. 500 to 505. Gilb. Ten. 85. post tit. 'Heriot.' And this stat. did not extend to the king's tenants *in capite*. F. N. B. 211. I. 235. A. 2 Bl. Com. 91, 289. post (n. 7.)

such feoffor himself held it, it follows that a perfect tenure cannot be created at this day between the feoffor and the feoffee; for a grant of any estate less than a fee simple, would create an imperfect tenure only; and it was evidently with this impression that Mr. Justice Blackstone observes, that it is essential to a manor, that there be tenants who hold of the lord (6).

Mr. Watkins contends, that the true reason why a manor cannot now be created, is, that copyholds must be held according to the custom of the manor; and that as a person cannot at this day create a custom, so he cannot create a manor, of which copyholds may be held (7).

(6) 2 Bl. Com. 92. And see Bro. Compris. &c. pl. 31, 34. Fitz. Avowrie, pl. 31. *Chetwode* v. *Crew* and others, Willes 614. *Bradshaw* & *Lawson*, 4 T. R. 443.

(7) 1 vol. on Cop. 15, 16. It is due to the great merit of Mr. Watkins's Treatise on Copyholds, to give the following extract from his observations in support of the above position.—"The statute of *quia emptores* (he says) did not extend to the tenants *in capite* of the king; and consequently it should seem from the statute *De prerogativa Regis* [17 Ed. 2. st. 1. cap. 6.], that they might have aliened part of their lands, even without licence, and, from what appears, to have been held of themselves, till the 17th of Edward the Second; so that sufficient was left to answer the services due: but yet the statute 34 Ed. 3. c. 15. was afterwards enacted, confirming the grants made by such tenants in the time of Henry the Third, but saving the prerogative of the king, of the times of his grandfather, his father, and of his own time.

"Now the statute of *quia emptores terrarum* is expressly confined to alienations in fee-simple; and it is acknowledged, that if a person at this day, seised in fee-simple, give

In many places a parsonage is a manor; where, for instance, before the statute of *quia emptores*, the patron, ordinary, and parson, granted parcel

lands to another in tail, or for life, the donee in tail, or grantee for life, shall hold of the donor. Here then is a tenure confessedly created. If a person seised in fee-simple of a thousand acres of land, which are held by him of a single lord, should grant out certain portions of such land to twenty persons for life, which he certainly would be warranted in doing, it may be asked, Would he not have a manor? The grantees are *his* tenants; they are not tenants to the lord above. In answer to this, it is said, that though he may create a tenure, he cannot create a manor: for a manor cannot be without a court; and a court cannot be but by continuance time out of mind. But, says Sir Martin Wright [Ten. 158-9. n. (h).], it is an obvious objection to this reasoning, that the like reasoning might have prevented any manors at all. And another objection to this reasoning is, that if it be absolutely necessary that a court should have existed time out of mind, the manors to which that court belonged must necessarily have existed time out of mind also; and if so, what becomes of the doctrine, that manors might have been created by a tenant of a common lord, till the statute of *quia emptores*, or by a tenant *in capite* of the king, till the 34th of Edward the Third?

"For the truth seems to be, from the very nature of the thing, as well as from historical facts, that the court was dependent upon the manor, and not the manor upon the court. The manor was the principal; the court was only an incident. On the creation of a manor, the court baron followed of necessity.

"With respect to the tenant *in capite*, was the stat. 34 Ed. 3. a repeal, *ex necessitate*, of the sixth chapter of the statute *De prerogativa Regis?* Upon the supposition that it was, it does not follow that the tenant *in capite* might not have aliened *with licence*. Even the statute *quia emptores* might, it is said, have been dispensed with by the lord: and the king was within that statute when the lands

of the glebe, to hold of the parson by certain services (8).

To every manor a common law court baron is incident (9), of which the suitors are the judges, as far as relates to any suits pending there; yet the steward of a court baron is clearly a constituent part of the court, and, as such, a judicial officer (10).

But the court, which is primarily the subject of our consideration, is properly called a Customary Court Baron, and is for those only who hold by

aliened under it were held of him *in capite ut de honore,* though he was not bound when they were held *in capite ut de corona.* It does not, therefore, seem to follow of necessity, that the creation of manors must have ceased in the reign of *Edward* the First. For though it is true, that it is essential to a manor that there be tenants who hold of the lord, yet the position, that by the operation of the statutes we have cited, no tenant *in capite,* since the accession of *Edward* the First, and no tenant of a common lord, since the statute of *quia emptores,* can create any new tenants to hold of himself, appears diametrically contrary to fact; unless, indeed, we suppose that it be absolutely essential to the very existence of a manor, that the tenants should be tenants in fee: the necessity of which the whole history of feuds, and the present system of copyholds, seem most completely to negative. But granting even that the tenants must necessarily have held in fee, it appears that the tenant *in capite* might have aliened in fee *with* licence after the passing of the latter act."

(8) Godb. 3. 1 Nels. Abr. Cop. 523. pl. 5.

(9) 4 Inst. 46, 268. 4 Co. 26. b. in *Melwich* & *Luter.* Cro. Jac. 260.

(10) *Chetwode* v. *Crew* & others, Willes 619. *Holroyd* v. *Breare* & *Holmes,* 2 Barnew. & Ald. 473. post, tit. 'Court Baron.'

copy of court roll; it is incident to every manor within which there are lands of that tenure, and, like the common law court baron, may be held at any place within the manor; and though there are not any free tenants, yet may the lord hold a customary court for his copyholders (11).

It is usual and expedient to hold courts baron and customary courts in the day time, but it would seem that they may be held after sun-set (12).

Fifteen days is considered to be the proper notice, being the common time between the teste and return of a writ in the common pleas, and it is usual to include three Sundays, and to affix the notice to the church door; but six or seven days' notice is said to be sufficient (13), and even four days was held to be so in *Taverner* & *Cromwell.*(14)

Though courts of this nature are void if holden out of the manor (15), yet, by immemorial custom, it will be sufficient if courts for several manors, are held together within one of them (16).

The customary court baron is generally held once in the year at some period fixed by the custom of the manor, and more usually within a

(11) *Melwich* & *Luter*, 4 Co. 26. S. C. Cro. Eliz. 102. Calth. Read. 13.

(12) Mo. 68. pl. 185. 6 Vin. Court. (G). pl. 10.

(13) Kitch. 11.

(14) Cro. Eliz. 353.

(15) But see Scroggs, of Courts, 88.

(16) Co. Lit. 58. a. Co. Cop. s. 31. Tr. 47-8. *Clifton* v. *Molineux*, 4 Co. 27. *Seagood* v. *Hone*, Cro. Car. 367. S. C. Sir Wm. Jones, 342. 2 D'Anvers, 179, 258. Duke of Suffolk's Case, cited by Popham, C. J. in *Sands* v. *Drury*, Cro. Eliz. 814. Scroggs, of Courts, 79.

month before or after Michaelmas; and the lord or steward is the judge of it (17): and when the custom has not established a fixed period, it is generally supposed that this court may be held as frequently as the lord pleases (18).

Special customary courts are also oftentimes called for the purpose of effecting the proposed transfer of copyhold property, by the admission of the new tenant, (the purchaser, or mortgagee, or perhaps trustee for particular objects,) but at such courts it is not regular to enter any presentment, or make any proclamation in furtherance of the acts of any prior general court; though I have known instances of the want of attention to this rule, and in which the proceedings might of course be impeached, on any adverse question.

It has been sometimes erroneously supposed, that courts baron and customary courts must be held within a month after Easter and Michaelmas in every year, but those are the periods prescribed by the statute of Magna Charta (19), and by 31 Ed. 3. c. 15. for the holding of courts leet only. For the form of summoning a customary court baron, see the Appendix, A.

The copyholders or tenants attending to do their fealty at this court, are called the homage, and are to be sworn to frame their presentments with impartiality, in the same manner as the

(17) Co.Litt.58.a. Kitch.163-4.

(18) But see post, tit. 'Fealty' and 'Court Baron.'

(19) C. 35. 6 Vin. Court, (G). Nels. Lex. Man. 132.

homage of the common law court baron, or the jury of a court leet. See the Appendix, B.

A manor is absolutely determined if the demesnes or services are once, by the act of the party, severed in fee simple, or if all the services become extinct (20): but although the manor is lost as far as relates to the holding of courts, yet it may be a manor by reputation, to sustain minor prescriptive rights (21): and notwithstanding a court baron is lost (as we shall see hereafter) (22) if there are not, at least, two free suitors, yet if

(20) *Sir Moyle Finch's* case, 6 Co. 63-4. *Lemon* & *Blackwell*, Skin. 191. *The King* & *the Bishop of Chester*, *ib.* 661. *Rex* v. *Staverton*, Yelv. 190: and see 2 Roll. Abr. 121-2 (F). Lit. Rep. 128, in *Brockham's* case. 1 And. 257. Yet it frequently happens at this day that a person has a manor, and the profits of court, &c. without possessing a single foot of land within it, and the manor is then termed a Seigniory in gross. See Kitch. 7. F. N. B. 8 B. 3 C.

(21) See *Soane* v. *Ireland*, 10 East 259, which was an action for a false return to a mandamus for appointing a sexton, and the second count stated that T. S. C. was seised in fee of the manor of F. S. with the appurtenances, and that he and all those whose estate he had, &c. from time immemorial had exercised and enjoyed the privilege of appointing a sexton of the parish of F. S. when, &c. It was proved in evidence that F. S. had ceased to be a legal manor for some period before the vacancy in question, for want of freehold tenants, and for this objection it was urged that the plaintiff ought to be nonsuited; but Bayley J. overruled the objection, and on a motion for a new trial, the rule was refused, Lord Ellenborough observing, that it was not necessary to prove it a continuing manor for *all* purposes. Vide also 1 Watk. on Cop. 22, cites Calth. Read. 13. Tr. 9 Ed. 4. pl. 17. f. 17. a. Danby.

(22) Post, tit. 'Court Baron.'

there be but one free tenant, the services as to him will continue (23).

One manor may be held of and become parcel of another manor, and a manor may be divided (24) and suspended, and may cease and revive. These several maxims are thus exemplified: If A. holds 20 acres of B. as of his manor of C., which manor B. holds of D. as of his manor of E., and the manor of C. escheats to D., the 20 acres are still holden of the manor of C., which by the escheat has become part of the manor of E., and by a lease of the latter manor it would pass, but after the escheat two courts baron can-

(23) See *Long* v. *Heminge*, Cro. Eliz. 209, 210. 1 Leo. 207. 4 Leo. 216. Sav. 103. 4 Co. 24. b. 25. a. 2 Ld. Raym. 864. 1 And. 257.

(24) But this is by act of law only. Vide post. Yet see *Smith* v. *Bonsall*, Gouldsb. 117, pl. 15, where it was said, per Walmesley, that if I grant away the moiety of my manor, we shall both keep courts; so if I be disseised of a moiety, or a moiety be in execution by elegit. And see *Harris* & *Haies* v. *Nichols*, Cro. Eliz. 19, where two justices held that if A. has a manor which extends into two towns, and he grants the demesnes and services in one town, the grantee has a manor in that town, and he may keep a court, and so has the grantor a manor in the other town, and he may keep court there: see also *Sir Anthony Denny's* case, 2 Leo. 190. And it should certainly seem that a manor might have been divided previous to the statute of *quia emptores terrarum*. See 1 Watk. on Cop. 16, et seq. cites M. 8. Ed. 2. f. 250. Mayn. Kitch. 4. a [7]. It is said, that if a manor extendeth to 4 Vills, and a grant is made of the manor in 3, so much as is in the 4th Vill will not pass. Bro. Done, &c. 26. Ib. Graunts 88. Vide also 1 Watk. on Cop. 16. n. (2d Ed.)

not be held, the services being extinct (25); and it is only by this means that two manors can be united into one (26).

And if upon a partition between parceners, parcels of the demesnes and services are allotted to each, each hath a manor, being in by act of law; for they were compellable to make partition at common law (27): but the rent and services of any one particular tenement could not be apportioned on such partition (28): and after a partition between joint-tenants, each of them hath not a manor, but they must both join in holding courts (29).

Copyholds are parcel of the demesnes of a manor, and if the lord leaseth for years all the demesnes, it is a suspension of the manor during the term of years (30).

And if on a partition of a manor between two sisters, A. and B., the demesnes are allotted to A. and the services to B., the manor is dissolved;

(25) *Marshe* & *Smith's* case, 1 Leo. 28. *Sir H. Nevil's* case, 11 Co. 17. S.C. *(Moore* v. *Goodgame)* Cro. Jac. 327. *Rex* v. *Staverton,* sup. S.C. *(Rex* v. *Stanton)* Cro. Jac. 259. 11 Co. 17. a. 32 H. 6. f. 9. 13 H. 7. 19. b.

(26) Co. Cop. s. 31. Tr. 47-8.

(27) *Sir Moyle Finch's* case, and *Marshe* & *Smith's* case, sup. and see 26 H. 8. 4. Bro. Manor. 1. 15 Viner, Manor. (G).

(28) M. 17 Ed. 3, pl. 102, f. 72. b. 1 Watk. on Cop. 17.

(29) *Morris* v. *Smith* & *Paget,* or *Marshe* & *Smith,* Cro. Eliz. 39. 1 Leo. 27.

(30) *Marshe* & *Smith's* case, sup. *Pymmock* & *Hilder,* Cro. Jac. 559; and see 2 Lord Raym. 864. *Hartop* v. *Tuck* and *Dalby,* Het. 14.

yet if A. dies without issue, and her part descends to B., it becomes a manor again (31).

Though a person cannot by his own act create a manor, yet it has been supposed, that if the lord grant the freehold of all or part of the copyholds within the manor to a stranger in fee, particularly if it is not a grant of a single copyhold only, that the grantee may keep a customary court, and re-grant the copyholds in case of escheat, &c. (32)

(31) *Thetford's* case, 1 Leo. 204. S. C. And. 221. *Sir Moyle Finch's* case, 6 Co. 64. a.; and see 2 Roll. Abr. 122. (F.) pl. 3. Ib. (H.), and the cases there cited from the Year Books. Bro. Extinguishment, 13. Fitz. Extinguishment, 5.

(32) *Sir Chr. Hatton's* case, cited 4 Co. 27. a. Cro. Eliz. 103, 395, 443, 662. *Neale* & *Jackson*, 4 Co. 26-7. S. C. Cro. Eliz. 394. *Morris* v. *Smith* & *Paget*, or *Marshe* & *Smith*, ubi sup. *Gay* & *Kay*, Cro. Eliz. 662. *Lemon* v. *Blackwell*, Skin. 191. *Smith* v. *Bonsall*, *Harris* & *Haies* v. *Nicholls*, and *Sir Anthony Denny's* case, ubi sup. 6 Vin. Cop. (H). pl. 2 & 4. Ib. (Z. d.) 15 Vin. Manor. (G). Kitch. 170. *Lord Dacre's* case, 1 Leo. 289. per Ayliff, J. "If the lord of a manor makes a feoffment of a parcel of his manor, which is holden by copy for life, and afterwards the copyholder dies, though now the lord has not any court, yet the feoffee may grant over the land by copy again." Vide also the third resolution in *Melwich* & *Luter's* case, 4 Co. 26. b. Cro. Eliz. 103. viz. that the grantee of the inheritance of all the copyholds might hold court for the copyhold tenements, and take surrenders, and make admittances and grants. But, by a note of the reporter in Cro. Eliz. it is stated, that on a writ of error in the Exchequer Chamber, all the Judges held, that no new copy could be made after the severance.

[The Author cannot discover any grounds for the distinction which has been made in some of the above cases, between a grant of several copyholds and

for which this reason is assigned; namely, that as the copyholders are not parties to the grant, it ought not to operate to their prejudice. There is, however, much authority against this position, but all agreeing, that the severance thus made by the lord, will not destroy the estate of the copyholder (33).

The case of *Bell* and *Langley*, as reported in 4 Leo. was this; A. the lord of a manor, enfeoffed B. of a copyhold of inheritance belonging to C., afterwards C. died, and the court of C. B. were unanimous that the customary interest was not determined, but that the copy should bind the feoffee, and that the admittance of the heir of C.

of a single copyhold only: see particularly the cases of *Lemon & Blackwell*, and *Neale & Jackson*.]

(33) Vide *Bell* or *Beale* v. *Langley*, 4 Leo. 230. S. C. 2 Leo. 208-9. *Melwich* & *Luter*, 4 Co. 26. S. C. Cro. Eliz. 102. *East* & *Harding*, Cro. Eliz. 498. *The Queen* v. *The Duchess of Buccleugh*, 6 Mod. 151. 6 Vin. Cop. (H). Ib. Cop. (S), (Z. d.) Co. Cop. s. 34. Tr. 69. And see *Bright* v. *Forth*, Cro. Eliz. 442-3: in this case the manor of C. extended over C. and B.; a recovery was suffered of the manor, excepting the lands in B., and in B. were copyholds, demesnes, and services; and it was resolved that copyholds could not afterwards be granted in B. Note therefore, that an exception of part of the demesnes and services, out of a grant of the manor, operates as a severance, equally with a separate grant of such demesnes and services—and see *Dyke* & *Bishop of Bath & Wells*, 6 Bro. P. C. [2d Edit.] p. 365: but when *all* the demesnes are excepted, it should seem that the exception is void. Winch. 23. *Mabies* case. So also is an exception of the Court Baron, *Lord North* & *Lady Dacre*, Cary 25.

sooner or later, be put at rest by a judicial opinion; and should the determination be favourable to the *quasi* lord (if I may be allowed the term), then there can be no doubt but that the subtraction of any services which continued after the severance, or any attempt to convert the copyhold into freehold tenure, or the committing of waste, would be a cause of forfeiture of the copyhold interest (35).

Although the copyholder is not without some advantage from the act of severance, as it exonerates him from the customary fine and suit of court, yet he receives a serious prejudice, presuming that an attempt to acquire a freehold title, by the only act which could establish it effectually, namely, a feoffment, would be a cause of forfeiture; for although his interest would be the subject of an assignment, yet that would bind the person only, and not the land; so that the *legal* title must be left in the copyholder and his heirs; which circumstance would necessarily operate as a clog to the free alienation of the

(35) *East* & *Harding*, ante; and see 1 Roll. Abr. Cop. (G) pl. 3, 4; and *Wakeford's* case, 1 Leo. 102, in which it was held that a release of the copyhold interest to a grantee of the freehold, is an extinguishment equally with a conveyance to the lord. S. P. Anon. Cro. Eliz. 21. Post, tit. 'Extinguishment.' See also Toth. Cases & Proceedings in Ch. p. 106, where it is said, under tit. Copyhold, "Severance from the manor hurts not;" cites *Gunn* v. *Buckmaster*, 21 & 22 Eliz. li. A. fo. 360.

property. In such a case it would be desirable, I think, to take the conveyance by a bargain and sale inrolled, as that form of assurance would not create a forfeiture of the copyhold interest, and it might be the best means of preserving evidence of title, from the period that the court rolls of the manor ceased to be so.

It would seem that when one manor is held by copy of another manor, the lord of the customary manor cannot keep courts baron, to have forfeitures or hold pleas in a writ of right; the privileges of a court being inconsistent with an estate at will (36).

When the demesnes are once separated from the manor, so that the custom is destroyed and they are no longer demiseable by copy, they can never re-unite; as if lands are forfeited, or escheat, or otherwise come to the hands of the lord of the manor, and he makes a lease for years, or for life, or other estate by deed, or even by parol (37); or a feoffment in fee on condition, even though the lord afterwards enters for the condition broken (38): but if the lord keeps the

(36) *Rex* v. *Stanton*, or *Staverton*, Cro. Jac. 259. Yelv. 190.

(37) *Douncliffe* & *Minors*, cited 1 Roll. Abr. 498. (B.) S. C. 6 Vin. Cop. (R.) pl. 1, 2, 3. *French's* case, 4 Co. 31. a. Cro. Car. 521. And when another person has acquired a term certain in copyholds, they surely cease to be demiseable; but see *Hutchings* v. *Strode*, Nels. Ch. R. 26, where equity aided a subsequent grant by copy, under the peculiar circumstances of the case.

(38) Co. Cop. s. 62. Tr. 141. *French's* case, sup.

land in his own hands, or lets it *at will*, he or his assigns may regrant at pleasure (39), even after a period of twenty years (40). Any lawful interruption, as the lands being extended, or recovered in a writ of dower, is equally a destruction of the demiseable quality, though a wrongful interruption, as a disseisin, is not so (41).

By a separation of the demesnes, I conceive, is meant, a separation produced by the act of the person having the fee simple of the manor, though in *Lee* and *Boothby* (42) it is said, that a lord *pro tempore* leasing a copyhold, is a severance; but the dictum in that case is in complete opposition to several authorities, which have established, that a lease by the lord, being tenant in tail, or for life or years only, will not destroy the custom as to the

(39) Co. Lit. 58. b. Co. Cop. s. 62. Tr. 141. *Douncliffe & Minors*, ante, p. 17. *Blemmerhasset* v. *Humberstone*, Hut. 65. S. C. Sir W. Jones, 41. *French's* case, 4 Co. 31. 1 Roll. Abr. 498. Cop. (B.) *Taverner & Cromwell*, 3 Leo. 108. 2 Sid. 19. *Cham* v. *Dover*, 1 Leo. 16. *Kempe & Carter*, 1 Leo. 55-6. And see Willes, 323. *Doe* d. *Gibbons* v. *Pott* and others, 2 Dougl. 720. It should seem that the King is an exception to the rule, that the copyhold interest is destroyed by a demise, and that the King, or his patentee, may afterwards regrant by copy. *Cremer* v. *Burnet*, Sty. 266. 2 Roll. Abr. 197. (G.) pl. 3, 4. *Fulham* v. *Fulham*, Mar. 206. *Lee* v. *Boothby*, 1 Keb. 720. S. C. W. Jones, 449. S. C. (called *Cholmly* v. *Cooper & Ward*). 3 Keb. 91. S. C. but not S. P. Cro. Car. 521. Gilb. Ten. 304.

(40) *Pemble* v. *Stern*, 2 Keb. 213. S. C. Sir T. Raym. 165. Sid. 316.

(41) *French's* case, sup. Co. Litt. 58. b. 324. b.

(42) Cro. Car. 521.

reversioner or remainder man (43); and is totally irreconcileable with the case of *Winter* and *Loveday* (44), in which the tenant for life was empowered to lease the settled estates except the demesnes; and the court held, that the exception extended to the copyholds as part of the demesnes, (notwithstanding there appeared to be no other land to which the power could apply), as the rents and services might be demised, though a rent could not be reserved on such a lease; and observed, that the power in question would have enabled the tenant for life to destroy all the copyholds, if it had extended to them, for although a lease of copyhold tenements by a *lessee* of a manor, does not operate as an extinguishment, yet, a lessee demising copyholds *by virtue of a power* derived out of the fee, is an absolute destruction of them.

A distinction is mentioned to have been made by Holt C. J. in one particular case (45), between a tenancy escheating and a purchase by the lord, namely, that in the former case, the land became part of the manor, but that in the latter it was only holden of the manor, and not part of it:

(43) *Rusley* & *Conesby*, 2 Roll.Abr.271.Prescrip.(T.)S.C. called *Conesbie* v. *Rusky*, Cro. Eliz.459.b. Gilb.Ten.300. Vide also Co. Litt. 58. b. (n.7.) post, tit. 'Lord of the Manor.'

(44) 1 Freeman, 507. S. C. Carth.427. S.C. 1 Lord Raym. 267.S.C.2 Salk.537.S.C.5 Mod. 244,378. S. C. 12 Mod. 147.

(45) Anon. 12 Mod.138. See also *Holmes* v. *Hanby*, 1 Sid. 284. ["12 Mod. is not a book of any authority." Per Buller, J. 1 Doug. 83.]

this seems quite an anomaly, as it is clear that in both cases the land might be re-granted by copy, though in each there was a union of the freehold and copyhold interest; and I cannot help thinking that there is some misprint in the report.

The above case of *Winter* and *Loveday* suggests the expediency of excepting copyholds, and the rents and services thereof, out of the usual power of leasing, in all family settlements of manors, to which lands of that tenure are attached, a precaution which is very seldom attended to.

THE DEMESNES of a manor may, however, under an immemorial usage, be granted out to another, and still remain parcel of the manor, which shews, that exclusive of the transcendent powers vested in the legislature (46), there is an exception to the

(46) See 35 Hen. 8. c. 13. enacting, that the King's manors of Granges, &c. in the county of Norfolk, formerly part of the possessions of the Abbey or Priory of Walsingham, should and might be granted by copy of court roll, in fee simple, or for term of life or lives, by the stewards of the said manors, their understewards or deputies, for such rents, services, fines, heriots, and customs, as in the said copies should be specified, which copies should be good against the King, his heirs, successors, and assigns. See also 37 H. 8. c. 2: enacting, that so much of Hounslow Heath as was the King's inheritance, and was meet for tillage, pasture, meadow, or other several ground, should be of the nature and condition of copyhold land: or the same might be letten by the steward of the manor, at will, or for 21 years, which lessee should or might improve it.

rule, that copyholds cannot be created at the present day.

In *Hughes* v. *Games* (47), it was admitted, that a lord by custom may, with the consent of the homage, make new grants of part of the manor, to hold by copy, and a case is mentioned by the reporter to have been cited to that effect; but whether a custom to do it without the homage would be good, the Chancellor said, was a question which must go to law. And in *Lord Northwick* v. *Stanway* (48), which was an action of assumpsit to recover the fine on admission to land in the manor of Harrow, it appeared that the premises were formerly part of the waste, and had been granted by the lord, to hold by copy; and, that there was an immemorial custom for the lord to grant parcels of the waste, whenever he should think proper, to hold by copy of court roll. The plaintiff had a verdict for 60*l.*, and afterwards, on a rule obtained for a new trial, one of the grounds of application being that the premises were not of copyhold tenure, the court, relying on the immemorial custom, and adverting to a similar custom in many manors in the north of England, held, that the premises

(47) Select Ca. Chan. Temp. King, 62. Vide also Lady *Wentworth* v. *Clay*, Ca. Temp. Finch. 263; but it does not appear, whether the ground to be set out by the homage, was to be granted, to hold by copy of court roll.—And see *Folkard* v. *Hemmett*, cited 5 T. R. 417. n. and post, at the end of tit. 'Pleading, &c.'

(48) 3 Bos. & Pul. 346.

were well described as copyhold, although the date of the grant was modern: but the application succeeded upon another, and perfectly distinct, ground (49).

Again in *Boulcott* v. *Winmill* (50) various instances were proved, from 1632, of grants by the lord of the manor of Westham, of parcels of the waste, some within and others without the ancient forest of Waltham, belonging to the crown, and subject to the jurisdiction of the forest courts. At the trial, M'Donald, C. B. was of opinion, that the custom was established, and the plaintiff had a verdict; and, on an application to the Court of King's Bench for a rule for a new trial, Lord Ellenborough held, that the waste might be legally granted out, though within the forest; and the other judges concurring, a rule was refused (51).

Length of possession will raise the presumption of a custom for the lord to grant out the waste by copy, see the *King* v. *the Inhabitants of Warblington* (52). In that case the lord of the manor of Havant had granted a small part of the waste, to hold by copy of court roll, with these words in the admission,—" fine one shilling, heriot one shilling, quit rent one shilling," and the grantee built a house upon the ground, but there

(49) See S. C. post, tit. 'Fine on admittance.'

(50) 2 Campb. 261.

(51) See also *Kempe* & *Carter's* case, 1 Leo. 55-6. *Bradshaw* & *Lawson*, 4 T.R. 446. *Bp. London* & *Rowe*, 3 Keb. 124. *Roe* d. *Newman* v. *Newman*, 2 Wils. 125. And see 2 Mau. & Selw. 508-9.

(52) 1 T.R. 241.

was no proof of any consideration having been paid. An order of removal of the son of the grantee, and his family, from Havant to Warblington, (from whence the father came into the parish of Havant with a certificate,) was confirmed by the court of sessions, and on an appeal to the Court of King's Bench, the above grant was not considered to be voluntary; and being a purchase under 30*l.* the court held that it did not give a settlement, since the stat. of 9 Geo. 1. c. 7. (53). The steward of the manor proved several grants of parts of the waste for a pecuniary consideration, and there having been near 40 years possession under the grant, the court deemed it a strong presumption in favour of the custom of granting the waste by copy.

It has been doubted whether the demesnes of a manor could not be granted even without an immemorial custom, but I apprehend that the above cases of grants of waste land, and those I am about to refer the reader to (54), have established, beyond all possibility of controversy, that since the statute of *quia emptores*, no new tenure can be created, except by special and immemorial custom, or by legislative enactment, and that no person can reserve to himself a right of escheat.

(53) Vide also the *King* v. *the Inhabitants of Wilby*, 2 Mau. & Selw. 504. The *King* v. *the Inhabitants of Hornchurch*, 2 Barnew. & Ald. 189.

(54) And see Co. Cop. s. 31. Tr. 45—6. Co. Litt. 58. b. Kitch. 60. Mo. 631. pl. 867. ante, p. 3, 4.

Of this class of cases is *Revell and others* v. *Jodrell* (55), which was an issue to try whether allotments made to copyholders, in respect of their copyholds on two commons, were freehold or copyhold; and, it appearing that certain woods taken by the copyholders under an agreement, in lieu of their right of common, had been *excepted* out of a grant of the manors under which the defendant claimed, the court held that they were thereby severed from the manor, and that the allotments made to the copyholders were freehold and not copyhold, agreeable to the rule, that a copyhold without custom cannot begin at this day. *Townley* & *Gibson* (56); where, under an inclosure act, an allotment of common and waste was to be made to the lady of the manor, in lieu of her right and interest in the soil of the residue of such common and waste, and then the remainder was to be allotted among the general proprietors, and such allotments were to vest in fee simple, discharged from all customary tenures, rents, &c. but the act was not to prejudice the right of the lady in or to the *seigniories* incident to the manor; on the contrary, she was thereafter to hold and enjoy all *rents, services, royalties,* and manorial jurisdictions whatsoever, and there was a subsisting lease granted by a former lord of the manor of the mines under the waste; and there the court held, that the mines under the waste,

(55) 2 T.R. 415. (56) 2 T.R. 701.

being part of the demesnes, and for which the lady received a satisfaction under the act, were not reserved by the clause reserving rents, royalties, &c. and that the tenants held their allotments as freehold estates of inheritance, and would not take them as copyhold unless the act so directed. It was also adjudged, that the lease remained valid, but that the right to the rents of the mines passed to the person in whose favour the allotment was made. The reader will observe, that mines, therefore, are not considered as a distinct right from the right to the soil of the freehold, but are part of the demesnes of a manor, and, consequently, that it is not sufficient (though frequently relied upon), when intended to except them out of the grant of waste, or the enfranchisement of copyhold land, to reserve to the lord the seigniories, royalties, and jurisdictions, incident to the manor, but that they should, in such a case, be reserved to him in express terms.

Another case of this class is *Doe* d. *Lowes* v. *Davidson* (57), which has established, that no private agreement can change freehold into copyhold or customary tenure, and that allotments of land of freehold tenure under an inclosure act, will not become of copyhold or customary tenure, without express words making them so; even although the allotments are in lieu of copyhold or

(57) 2 Mau. & Selw. 175. See also the *King* v. *The Inhabitants of Hornchurch.* 2 Barn. & Ald. 189.

customary tenements, or rights appendant thereto; which is, therefore, an exception to the rule, that *accessorium sequitur principale.*

As *Doe* & *Davidson* is a case of considerable interest, and may be the subject of frequent reference, I propose to give a full extract from the report of it. It was an ejectment to recover customary lands in the manor of Ridley in Northumberland, where the custom is, that the tenements within the manor, pass either by surrender and admittance at the lord's court, or by any species of common-law assurance, accompanied by the license of the lord; but they are not deviseable by will. In 1749, by articles between the lord of the manor and several persons intitled to right of common over two commons within the manor, it was agreed, that such commons should be divided and set out by the persons named, who should apportion to the lord, as a recompense for his right in the soil, a certain part of one of those commons, and that the rest should be divided among the lord and the several persons having right of common, according to the yearly value of their tenements; and that, after the division, all rights of common should cease, saving to the lord *all mines*, &c. and all the *royalties* which he and the former lords had enjoyed. An award was made by the commissioners, whereby they allotted part of the commons to W. L. in respect of his right of common for his customary estates, and by a subsequent private act of parliament,

the above articles and award were confirmed; in which act it was provided, that nothing therein contained should extend to revoke or alter any settlement, &c. of lands so agreed to be enclosed, but that the several allotments should be and enure, and be enjoyed to the same uses, &c. as the tenements, in respect whereof the allotments were made; and that the act should not prejudice, lessen, or defeat the right *of the lord in and to the seigniories and royalties incident to the manor*, but that he should hold and enjoy *all rents, services, courts, royalties, &c.* (other than and except common right,) in and upon the said commons, as fully as if the act had not been made. The premises, for which the ejectment was brought, were allotments, under the articles and award, confirmed by the act, and some of which were awarded to W. L. and others purchased by him after the award, and all which, since the allotment, had been considered as freehold. W. L. devised to his eldest son and heir, J. L. and his heirs, all his real estates, without mentioning customary estates. J. L. was admitted, as heir at law, to the customary tenements of which his father died seised, and by his will devised all his real estate, as well copyhold and customary as freehold, (except certain messuages set apart for payment of his debts,) to his son W. C. L. in tail, with remainder to the defendant in fee. W. C. L. was the only child of J. L., and he died an infant and without issue. The lessor of the plaintiff was the brother of

J. L. and uncle and heir of W. C. L. At the assizes a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench, whether the custom, not allowing of a disposition by will, extended to the new allotments; or whether they passed by the will of J. L.

The Court, stopping the counsel for the defendant, and adverting to the above cases of *Revell* and *Jodrell*, and *Townley* and *Gibson*, which had decided that customary tenure could not now be created, except by act of parliament, or by custom to warrant the grant of waste, held, that the allotments in question, continued to be of the same tenure after the award and act of parliament (58), as they were before, and must go to those who were intitled to claim them, as passing under the will as freehold, and that the agreement and award could not alter the tenure; neither did the act of parliament alter it, in the construction put upon it by the court, the reservation to the lord, being only of the same rights over the freehold land, then become the freehold of the tenants, which he before had enjoyed, as lord over the same land, when it was his own freehold.

(58) Vide the case of *Farrer* v. *Billing*, 2 Barnew. & Ald. 171, which has decided, that when, under a local inclosure act, there is no special provision to the contrary, the legal title to an allotment, is not acquired by the person to whom it is made, until the execution and proclamation of the commissioners' award.

THE CUSTOMS of a manor must be immemorial (59), reasonable, and certain (60), or they cannot be supported; therefore, a custom, that a feme covert seised in fee might dispose of her estate, without her husband's joining, was held to be bad, being contrary to good policy (61). So a custom that after the death of a tenant for life, the lord is compellable to grant to a particular person, as to the son, and if no son to the daughter, and so *in perpetuum*, is void, though a custom for a copyholder to nominate his successor is good, the former being to compel the lord, who has the interest, to make a grant of it, and the latter compelling an admittance, where the interest is in the copyholder (62). Again, a

(59) Co. Cop. s. 33. *Jackman* v. *Hoddesdon*, Cro. Eliz. 351. So a privilege attached to ancient messuages, cannot be claimed in respect of a tenement built within 20 years; and where the custom *only* was traversed in the replication, it was held to be sufficient, the antiquity being involved in the issue, under the plea of the defendant, stating, that from time immemorial all the customary tenants had exercised the alleged right. *Dunstan* v. *Tresides*, 5 T.R. 2.

(60) 2 H. 4. 10. Co. Cop. s. 33. Tr. 61, 62-3. Kit. 204. And if any part of the custom be bad, it avoids the whole. *Wilkes* v. *Broadbent*, 2 Stra. 1225. It is sufficient to shew that a custom (which must always be alleged in the land), was *reasonable* in its commencement, but a prescription (which is alleged in the person), must be shewn to have a *lawful* beginning. 6 Co. 60. b. in *Gateward's* case.

(61) *Stevens* d. *Wise* v. *Tyrell*, 2 Wils. 1. And a custom against the king's prerogative is not allowable, Davis's Rep. 33. b.

(62) *Lord Grey's* case, Mo.

custom that those who claim, ought to come into court at the first, second, or third proclamation, to take up their estates, or that they should be forfeited, was held, even before the statute of 9 Geo. 1. c. 29., not to extend to an heir beyond sea, or being an infant (63).

In *Fenn* d. *Richards* v. *Mariott* (64), a custom that the grantee of customary estates, passing either by deed or surrender, must be admitted during the life of the grantor, was held to be good in law; the Court observing, that it was fit that such grantees should be admitted in some reasonable time, and that the custom had limited that time.

In a recent case (65), evidence was given of a custom in the manor of Honiton, Wilts, by which, after the death of the tenant in possession, of copyholds held for lives in succession, with a

788. pl. 1088. *Ball's* case, 4 Leo. 238. a. *Rowles* v. *Mason*, 1 Brownl. 132. 2 Brownl. 85, 192. 1 Roll. Abr. 562. (H.), pl. 1. *Devenish* v. *Baines*, 2 Eq. Ca. Abr. 43-4. Pre. Ch. 3. *Warne* v. *Sawyer*, 1 Roll. Rep. 48, cites *Crabb* & *Bevis*. See also Noy, 2. *Ford* v. *Hoskins*, Cro. Jac. 368. S. C. Mo. 842. S. C. 1 Roll. Rep. 125. S. C. 2 Bulst. 336. 1 Eq. Abr. 118. c. 2.; and see *Mardiner* & *Elliott*, 2 T. R. 746. But a copyholder could not nominate part to one and part to another, 2 Brownl. 199; yet it should seem, that he might so dispose of the beneficial interest, 2 Eq. Ca. Abr. 43.

(63) *King* v. *Dilliston*, 3 Mod. 221. S. C. 1 Salk. 386. S. C. 1 Show. 31, 83; and see the references in the margins. Vide also *Sir Richard Lechford's* case, 8 Co. 99. *Whitton* v. *Williams*, Cro. Jac. 101. Godb. 268. pl. 371. *Smith* v. *Paynton*, Cart. 86. 17 Ves. 90.

(64) Willes, 430.

(65) *Edwards* v. *Fidel*, 3 Madd. Rep. V. C. Court, 238.

grant in reversion, the life in reversion is entitled to hold the estate beneficially, unless it should appear by the court rolls, that a trust was intended for the lives in succession; and the present Vice Chancellor, held, that the custom was reasonable, as it prevented disputes with regard to secret trusts.

It has also been decided very lately in the Court of King's Bench, that a custom for the steward, or his deputy, to have the sole right of preparing all the surrenders of copyhold estates within the manor, is a reasonable custom, being a qualification of the power of alienation, and an advantage to the tenant, the steward being bound to prepare the surrender for a fixed fee, and better acquainted with the estate, than any stranger could be (66).

A custom for the lord and his tenants of collieries, to sink pits within the freehold lands for working the same, and to lay the coals, &c. on the lands near to such pits, being customary tenements parcel of the manor, and to lay wood there for the use of the pits, was deemed unreasonable and void (67).

(66) *Rex* v. *Rigge*, 2 Barnew. & Ald. 550.

(67) *Broadbent* v. *Wilks*, Willes, 360. S. C. in error. 1 Wils. 63. S. C. 2 Strange, 1224. A custom that all the inhabitants of a manor, should grind all their corn whatever at particular mills, would be void; *secus* if confined to corn used or spent ground within the manor. *Cort* v. *Birkbeck*, 1 Doug. 218; and see *Higges* & *Gardener*, M. 11 Ja. B. R. 1 Roll. Abr. 559. pl. 4. A custom enabling the lord totally to annihilate the right of common, could not be supported. *Badger* v. *Ford*, 3 Barn. & Ald. 155.

And, in *Wilson* v. *Willis* (68), a custom in the manor of Hampstead in Middlesex, for the customary tenants, having a garden parcel thereof, to dig and carry away turf fit and proper to be used, as often as occasion required, for making and repairing grass plots in such gardens, was held incapable of being supported, from its not defining what sort of improvement was meant, and which therefore extended to all sorts of fanciful alterations.

A single act if unresisted may be evidence of a custom, but will not make a custom (69).

One custom may be subservient to another, as in *Bateson* v. *Green* (70), where it was held, that the lord having a right to dig clay pits, might do so, or authorize others to do it, to the prejudice of the right of herbage in the commoners.

A custom that lands shall descend to the heirs male in the collateral line, excluding females in the lineal, will be supported (71).

And a custom may be reasonable in its commencement, if it is for the common benefit, though

(68) 7 East. 121. See also *Bell* v. *Wardell*, Willes, 202, and the several authorities mentioned in the notes to that case, and in *Broadbent* v. *Wilks*, Willes 362-3. See further as to customs, 1 Roll. Abr. 558. et seq.

(69) *Doe* v. *Mason*, 3 Wils. 63. *Roe* v. *Jeffery*, 2 Mau. & Sel. 92.

(70) 5 T.R. 411.

(71) *Sympson* v. *Quinley* or *Quinsey*, 1 Vent. 88. S. C. 2 Keb. 672. And a custom that an executor or administrator shall have a year in the land of a copyholder, against the wife intitled to freebench, is good. *Rennington* v. *Cole*, Noy, 29.

it tends to an individual prejudice, therefore a custom will not be deemed void, merely because it is prejudicial to, or diminishes, the lord's casualty or profit as to escheat (72).

When a doubt exists as to the validity of a custom, it is to be tried by a jury of the county, and not by the judges, unless the same has been before tried, determined, and recorded in the same court (73).

The law takes notice of general customs, such as Gavelkind and Borough English, but others must be specially pleaded (74), and the proof rests with him who alleges it (75). But one custom may be pleaded against another, where both may stand together (76). And it may here be proper to observe, that equity does not require a custom to be set forth with so much exactness as is requisite at law (77).

(72) Gilb. Ten. [4th Ed.] p. 323, et seq. Fisher, 40-1. Kit. 204-5. 2 Ves. 303, in *Fawcet* & *Lowther*. A custom giving a right of pre-emption to particular persons, as, for instance, the nearest relation, or next neighbour, &c. has been deemed reasonable. Jenk. 274. pl. 95. 2 Brownl. 196. in *Rowles* & *Mason*.

(73) 1 Bl. Com. 76. And see *Mortimer* v. *Petifer*, Cro. Jac. 302.; *Jewell* v. *Horwood*, 1 Roll. Rep. 263.; *Edwin* v. *Thomas*, 2 Vern. 75.

(74) Rob. Gav. b. 1. c. 3. p. 38. 2 Danv. 184. p. 2. *Clements* v. *Scudamore*, 1 Salk. 243. (cites *Fane* & *Barr*, Hil. 1659.) S. C. 1 P. W. 63. S. C. 6 Mod. 120. S. C. 2 Lord Raym. 1024. 1 Bl. Com. 76.

(75) *Ewer* v. *Astwicke*, 1 And. 192. Rob. Gav. c. 4. p. 38. *Roberts* v. *Young*, Hob. 286. S. C. 1 Brownl. 172-3.

(76) *Kinchin* v. *Knight*, 1 Sir W. Bl. 49.

(77) *Dean and Chapter of Ely* v. *Warren*, 2 Atk. 190. It

All customs in deprivation or bar of a copyholder's estate are to be construed strictly (78); so if the custom is, that the first taker may *surrender* to the lord, and destroy the estates in remainder, *a fine* will not bar the remainders (79); and if there is a particular custom as to descent, where the *tenants die seised*, there, according to the case of *Fane* v. *Barr* (80), the dying seised is essential to bring the case within the custom: And in cases of descent, if the custom is silent, the common law must regulate the course of it (81); if the custom, therefore, is, that the land shall descend to the eldest sister, where there is

was decided in this case, that a copyholder in fenny countries, after the land is drained, may be intitled to common of turbary, and dig turf by way of compensation.

As to the necessity of setting forth a custom with exactness, in pleadings at law, see *Griffin* v. *Blandford*, Cowp. 63. Post, tit. "Pleadings," &c.

(78) *Baspool* v. *Long*, Cro. Eliz. 879. S. C. Yelv. 1. but Popham J. said, that when a custom goes to the making and maintenance of a copyhold estate, it shall be taken favourably. And see Carter, 88. in *Smith* v. *Paynton*. *Borneford* & *Packington*, 1 Leo. 1.

(79) *Zinzan* v. *Talmadge*, Pellexf. 564. S. C. Sir T. Ray. 402. S. C. T. Jones, 142. S. C. 2 Sho. 130. And see *Smartle* v. *Penhallow*, 6 Mod. 63. S. C. 1 Salk. 188. S. C. 2 Lord Raym. 994. S. C. 3 Salk. 181. *Archer* v. *Bokenham*, 11 Mod. 160. Rob. Gav. 1. c. 6. p. 93.

(80) Ante, (n. 74.)

(81) *Ratcliffe* & *Chaplin's* case, 4. Leo. 242. S. C. (called *Ropley* & *Chaplein*) Godb. 166. pl. 232. *Denn* d. *Goodwin* v. *Spray*, 1 T. R. 466. Co. Cop. s. 33. Tr. 63-4. Ib. s. 50. Tr. 116. 1 Roll. Abr. 624. pl. 2. *Brown* v. *Dyer*, 11 Mod. 98. S. C. Holt, 165.

neither a son nor daughter, it does not extend to the eldest niece, nor the eldest aunt; and if the custom is for the youngest son to inherit, and a man has issue two sons, and dies, and the land descends to the youngest son, who dies without issue, the eldest son of the eldest brother shall have the land: but the doctrine in *Ratcliffe* and *Chaplin*, that to prove a custom it must be shewn by precedents to have been *put in use*, and that reputation only is not sufficient, was overruled in *Doe* d. *Foster* and another, v. *Sisson* (82), where there was an entry on the rolls, proving a custom in favour of a descent to the eldest sister in exclusion of the others, another entry proving a custom in favour of the eldest daughter, and a third extending the custom to a nephew, and there was evidence of reputation in favour of the eldest daughter and eldest sister respectively, and their respective *descendants;* and the court thought it was admissible evidence for the jury to decide, whether the custom extended to *a great nephew*. And in *Doe* d. *Mason* v. *Mason* (83), where the custom of descent was clearly proved to extend to the youngest son, and if no son to the youngest brother, and there was one instance only in favour of a youngest *nephew;* the plaintiff, who claimed as youngest nephew and heir

(82) 12 East, 62. And see *Roe* d. *Beebee* v. *Parker*, 5 T.R. 26.

(83) 3 Wils. 63. Ante, p. 32.

by the custom, had a verdict in ejectment, and the court refused a new trial.

But in *Newton* v. *Shafto* (84), the continuation of the estate of the husband by the possession of the wife, as in the case of freebench, induced a liberal construction of a custom in favour of a second daughter, who became the eldest by the death of her sister in her mother's lifetime; the custom being, that if the father died leaving no son, but two or more daughters, the eldest daughter should have the land for her life.

Although the common law will prevail in collateral matters, where the custom is silent (85), yet a custom will attach to a lineal descent, therefore if it is in favour of a youngest son, or an eldest or youngest daughter, the issue of such son or daughter will be within the custom (86).

And it would seem that these particular customs extend to trust estates (87), except when confined to the *dying seised* (88); though not to

(84) 1 Lev. 172. S. C. 1 Keb. 925. S. C. 2 Keb. 111, 158. S. C. 1 Sid. 267.

(85) Sup. (n. 81).

(86) *Clements* v. *Scudamore*, ante, p. 33. *Godfrey* v. *Bullock*, 1 Roll. Abr. 623. Descent (A.) pl. 3. 2 Danv. 549. pl. 3.

(87) 1 Co. 100. b. in *Shelley's* case. *Jones & Reasbie*, Gilb. Uses, 19. *Edwin* v. *Thomas*, 1 Vern. 489. 2 Vern. 75. 2 Roll. Abr. 780 (D). Vin. Abr. Uses, (D.) post, tit. Trust Estates. Vide also Belt's Supp. to Ves. Sen. p. 348, in *Fawcet* v. *Lowther*; but see 2 Eq. Ca. Abr. 509, in *Helley* v. *Helley*. Cary, 15.

(88) *Clements* v. *Scudamore*, sup. And see *Reeve* v. *Malster*, Sir W. Jones, 361. S. C. Cro.

executory trusts (89), nor to lands purchased by the lord, which, as I am about to shew, go with the manor.

The customary descent attaches, I conceive, to a limitation to one and his heirs *pur auter vie;* and to a rent granted *de novo,* or reserved out of copyhold land (90); it also attaches to a resulting use, or reversion in fee of copyholds (91); but not to a remainder in lands, where the custom is Borough English or Gavelkind, when limited to the right heirs as purchasers (92).

In the case of *Clements* v. *Scudamore* (93), Holt C. J. in delivering the resolution of the court, that the daughter of the youngest son should inherit the copyhold lands purchased by the father, *jure representationis,* (and which lands were of the nature of Borough English,) noticed the case of *Fane* and *Barr* (94): the custom there was, that the copyhold land of every *tenant dying seised,* de-

Car. 410. 1 Roll. Abr. 624. pl. 1. *Newton* v. *Shafto,* sup. 1 P. W. 65.

(89) See tit. Exec. Trusts, post. Vide also 2 Watk. on Cop. 62.

(90) *Baxter* v. *Dowdswell,* 2 Lev. 138. *Clements* v. *Scudamore,* ante, p. 33. Bro. Rents, 10, 13. Rob. Gav. 1. c. 5. p. 79. et seq. *Randal* v. *Writtle,* 2 Lev. 87. 1 Mod. 96, 112. 3 Keb. 165, 214. *Stokes* & *Verryer,* ib. 292. 1 Vern. 489. But see n. 1. *Knoles's* case, Dy. 5. b. Br. Descent. 11. 1 Co. 100. b. Cary, 15. *Randal* v. *Roberts,* Noy. 15. Co. Cop. s. 33. Tr. 63-4.

(91) *Fawcet* v. *Lowther,* 2 Ves. 302. 3 P. W. 63.

(92) Watk. on Desc. c. 5. p. 148-9. See further as to customs, post, tit. 'Evidence.'

(93) Sup.

(94) Ante, p. 33.

scended to the youngest son; and a surrender had been made to the use of A. and his heirs: A. died before admittance, and it was agreed that his youngest son should inherit if A. had been admitted, but he not having been admitted, it was adjudged, that the eldest son should inherit.

But it is to be observed, (and the circumstance was particularly adverted to by C. J. Holt,) that the custom required both a *seisin* and a *dying seised.* When, therefore, the custom is general, that all copyholds within the manor shall descend to the youngest son, and not the land of every *tenant dying seised,* (the latter implying that the custom extends only to those cases where admittance has actually taken place,) there appears to me to be good grounds for contending, that under a surrender to A. and his heirs, the youngest son of A. would be entitled to admission, in case of A.'s death, without having been admitted tenant under the surrender; for the law, on the admission of the heir of a surrenderee, casts the descent upon him, so as to make the ancestor seised, by relation, from the date of the surrender (95).

And it seems to be quite clear, that when copyhold lands of customary *Borough English* or *Gavelkind* tenure, are surrendered to the use

(95) Post, tit. 'Admittance.' *Blunt* v. *Clarke,* 2 Sid. 61. 5 Burr. 2786-7, in *Vaughan* & *Atkins.* But see M. 10 Jac. B. R. 1 Roll. Abr. 502. (M.) pl. 2. 6 Vin. Cop. (B. b. 2.) pl. 1.

of a man and his heirs, who dies before admittance, the customary descent shall take place(96).

But it must not be forgotten, that the customs of a manor, as to estates held by copy of court roll, are destroyed by enfranchisement or extinguishment.

It may here be proper to observe, that any disposition made of a manor, whether by way of settlement or mortgage, or by devise, will carry with it any lands held of the manor, that shall be subsequently purchased by and surrendered to the lord. The following cases are authorities on this point; A., the lord of the manor of S., in 1754 mortgaged that manor, with other estates, for a term of years, and in 1755 mortgaged the same estates in fee for securing 20,000*l.*, out of which the first mortgage was discharged, and the term was thereupon assigned to a trustee for better securing the 20,000*l.* A. subsequently purchased several copyholds within the manor, which were surrendered to him in fee, and he also purchased a freehold estate in S. and took a conveyance thereof, and afterwards mortgaged the same in fee, for further securing

(96) *Blunt* v. *Clarke*, sup. *Baker* v. *Dereham*, or *Barker* v. *Denham*, 1 Mod. 102. Sty. 145. 1 Vent. 261. 1 P. W. 66. *Reeve* v. *Malster*, Cro. Car. 410. S. C. W. Jones, 361. Rob. Gav. b. 1. c. 6. p. 98. Gilb. Ten. 388.

the 20,000*l.* In 1771, upon the then intended marriage of his eldest son, he settled the above manor and estates, (subject to certain annuities), to the use of himself for life, remainder to trustees to support, &c. remainder to the use of his said eldest son for life, with several remainders over, and the ultimate remainder to A. in fee. In 1772, A. made his will, and devised the reversion in fee of the said manor and settled estates, to trustees upon certain trusts; and, after reciting that he had made several very considerable purchases of *several other real estates* at S., he thereby gave to the same trustees and their heirs, all other his messuages, lands, hereditaments, and *real estates* at S. (except such parts as were enclosed within his gardens and park), in trust to sell and dispose thereof. In 1776, the mortgage for 20,000*l.* was paid off, and the legal fee conveyed to the uses of the settlement of 1771, and the freehold estate purchased subsequently, was also conveyed to the uses of the settlement. A. afterwards died without revoking or altering his will, and the surviving trustee under the will, conceiving himself intitled to the premises contained in the above surrenders, and also to the freehold estates purchased after the date of the settlement, contracted for the sale thereof; but the son, who was the heir at law of A., also conceiving himself intitled to the premises, brought an ejectment for the recovery thereof, and upon the

trial, before Lord Mansfield, at the sittings for Middlesex, a case was reserved for the opinion of the Court of King's Bench; the question (so far as relates to the copyholds) being, whether the lessor of the plaintiff, as heir at law of his father, or as tenant for life in possession of the settled estates, was intitled to the premises comprised in the surrenders? The court thought that the copyholds followed the uses of the marriage settlement, and gave as the grounds of their opinion, the following reasons; viz. that after the mortgage, the mortgagee in fee had a right to the manor and every thing held of it; that in *notion of law* the mortgagor was only tenant at will, or, at most, from year to year: in *equity*, he was lord of the manor, subject to the mortgage, but he could do nothing to weaken the security. That he had the option, *if he had been absolutely tenant in fee*, either to continue the copyholds as parcel of the manor, by granting them out again by copy, because the custom was not broken by their merely having continued in the lord's hand, but they might, notwithstanding, be alleged to have been demised and demiseable, by copy of court roll, which was all that was necessary; or, to sever them from the manor, by any common law conveyance, as a lease, &c. (97).

But that the manor being mortgaged in fee, he

(97) Ante, p. 17, 18.; and see *Badger* v. *Ford*, 3 Barn. & Ald. 155.

could not sever them, because *that* would have diminished the security; for the mortgagee had a right to the services, quit rents, escheats, forfeitures, and other casualties. If his legal interest was considered, being only tenant at will, he could not sever the copyholds. That the argument was stronger on the settlement, for the surrenders had then been made, and all was included in the settlement, so that, after *that*, he could not sever, in respect of the settlement. That it was plain, on the face of the will of A., that he had no idea of severing the copyholds, for he devised only the *reversion* of the manor, without mentioning the customary lands. Therefore, *quâcunque viâ*, they were clearly of opinion, that the son was intitled to the copyhold tenements, because, 1st, they were settled as part of the manor, and could not be severed by the will; and 2dly, if they could have been severed by the will, *that* was not done (98).

So it is settled, that if one who has a manor devise it, and, after a tenancy escheat, that shall pass by the devise as part of the manor (99).

And in *Roe* d. *Hale* v. *Wegg* and others (100), it was held, that a devise of a manor will pass a copyhold estate held of the manor, and subsequently purchased by and surrendered to the

(98) *Doe* d. *Gibbons* v. *Pott* and others, 2 Dougl. 710; and see Mo. 94. pl. 233. Sir T. Parker, 193. Owen, 37.

(99) See *Bunter* or *Brunker*, v. *Coke*, 1 Salk. 238. S. C. Holt, 247. S. C. 11 Mod. 129.

(100) 6 T. R. 708.

lord, and that a demise of the estate, from year to year, did not alter the case, (not operating as a severance,) for the will of a freehold is not revoked by a subsequent lease.

The reader is here referred to the case of *Thinne* v. *Thinne* (101), in which it was held, that lands not actually parcel of a manor, but which were purchased by the lord, and afterwards had been reputed to be so, passed in a recovery deed, and the recovery suffered in pursuance thereof, by the description of the manor and all lands parcel or reputed parcel.

I shall conclude the subject of the present chapter by observing, that if the lord of a manor, tenant for life, purchases copyholds within the manor, and is desirous that the copyhold interest should not be destroyed, he should take the surrender to a trustee, or regrant immediately; as it has been decided, that a surrender to him in fee, although he afterwards covenants to surrender by way of mortgage, extinguishes the copyhold for the benefit of those intitled to the manor in remainder. *St. Paul* v. *Viscount Dudley and Ward* (102). In that case, the tenant for life had devised all his real estates in trust to pay debts, and subject thereto in trust for A. B.

(101) 1 Lev. 27, and see the several books mentioned in the margin of that report; and also *Sir Moyle Finch's* case, 6 Co. 64-5. Yelv. 191. See further as to what words will pass a nominal manor, *Norris* & *Le Neve*, 3 Atk. 82. *Mallet's* case, Cro. Eliz. 524. Lex Cust. 7.

(102) 15 Ves. 167. See also 1 vol. Cas. & Opin. 187.

in strict settlement; but, as he had not regranted the estate, the Chancellor held, that there was no evidence of intention to raise an equity against the remainder man, (the then lord of the manor), and that the covenant to surrender to the mortgagee of the freehold, did not amount in equity to a regrant, in favour of a third party (the devisees), as such regrant might have been made without giving them any interest; though he admitted, that if tenant for life, having a power to grant, covenants to make such a grant, it would in equity bind the remainder man, being in the nature of an execution of the power. The case of a tenant for life paying off an incumbrance, was noticed, *arguendo*, as favourable to the devisees; but the Chancellor thought the analogy was rather against them; for, (he observed,) if a tenant for life merges the security, by taking an assignment connecting it with the inheritance, there is *prima facie* no charge.

CHAP. II.

Of the Antiquity, and distinguishing Properties, of Copyhold Tenure.

It would be inconsistent with the nature and object of this treatise, for the author to offer any comments of his own, on the origin and antiquity of copyholds; and, as applicable to this country (1), it could not perhaps be traced, with any degree of certainty, either from history or law authority. On this subject, much learned and interesting matter will be found in the works of Littleton and Coke (2), and the reader is also referred to the second volume of Mr. Justice Blackstone's Commentaries, p. 92 to 101, and the authorities of Bracton, Britton, Fleta, and others, cited by that much distinguished judge, and from which he draws the conclusion, "that "copyholders are in truth no other but villeins, "who, by a long series of immemorial encroach- "ments on the lord, have at last established a

(1) Lord Coke, in the case of *Bagnal* & *Tucker*, 2 Brownl. Rep. is stated to have said, that the third part of the realm of England consisted of copyholds.

(2) See more particularly Co. Litt. 58. a. 61. a. Co. Cop. s. 1. to 9. inclusive, and s. 32. Vide also Kitch. p. 174. Viner's Abr. Cop. (A.) 1 Cru. Dig. 54.

" customary right to those estates, which before " were held absolutely at the lord's will."

Sir Martin Wright gives his sanction to the opinion of the learned commentator, in the following interesting conclusion of his most excellent treatise, intitled, "An Introduction to the " Law of Tenures," [3d ed. p. 215.] " Copy- " holds," he says, " are the remains of villen- " age (*a*), which, considered as a tenure (*b*), was " not intirely *Saxon* (*c*), *Norman* (*d*), or *Feudal* (*e*), " but a tenure of a mixed nature, advanced " upon the *Saxon bondage*, and which gradually " superseded it; so that we must look partly at

" (*a*) Vide F. N. B. 12. C. " 1 Ins. 58. a. Bacon (after- " wards Lord Verulam) Use " of the Law, 42, 43.

" (*b*) The author of the *Old* " *Tenures*, and *Littleton*, do " both of them treat it not " only as a *tenure*, but as a " *state of bondage*. Vide Old " Tenures, and Lit. tit. Villen- " age.

" (*c*) The termination of " *villenage*, and the *fealty* in- " cident to the *tenure*, prove " that it was not *Saxon*, or " prior to other *tenures*; and " therefore such authors as " suppose *villenage* to have " been in *England* before the " *Conquest*, must be under- " stood to speak of it as a state " of *bondage*, and not as a real " *tenure*. *Vid. Somn. Treat. of* " *Gav.* 65, 66. *Temp. Introd.* " *to the Hist. of Engl.* 59.

" (*d*) There is no title or " hint of any such *tenure* in " the Custumier of *Normandy*.

" (*e*) For the Feudists make " no mention of any such te- " nure, and therefore *Crag.* " treats it as a tenure peculiar " to the *English*, *et quasi scin-* " *tilla servitutis apud Anglos* " *adhuc latens*. *Crag. de Jur.* " *Feud.* 71. Besides *Livery* or " *Investiture* is wanting, which " is clearly necessary to every " *fee* or *tenure*.

" home for its original, which, though it cannot " be traced without running into greater length " and nicety, than would be agreeable to my " present design, may possibly be hinted in a " very few words; For if the *Normans* found, " as we are assured they did (*f*), 'a sort of " 'people among us who were, as Sir William " 'Temple says, in a condition of downright " 'servitude, used and employed in the most " 'servile works, and belonged, they, their chil- " 'dren and effects, to the lord of the soil, like " 'the rest of the stock or cattle upon it' (*g*); " nothing is more likely, than that they, who " were strangers to any other than a feudal state, " should infranchise all such wretched persons " as fell to their share, by admitting them to " *fealty* (*h*), in respect of the little *livings* they

" (*f*) Vide Temp. Introd. " 59.; Bacon, Hist. of the " Eng. Gov. 56.; Brady, Gen. " Pref. 26.; and Spelm. Gloss. " ad Verb. Servus.

" (*g*) Persons of this condi- " tion were called by the Saxons " *Theow* and *Theowmen*, and in " the *Latin* Laws of Will. I. " (cap. 65, 66.) and of Hen. I. " (cap. 77, 78.) *Servi.*

" (*h*) That the admission of " a *bondman* to *homage* or *fealty* " amounted to *infranchisement*, " appears from the Mirror (lib. " 2. sect. 28. p. 167, 168.) " *Devient serfs frank si son* " *seignior preigne lour hom-* " *mage—ou sufre son serf—ju-* " *rour entre francs a foyer de* " *frank sachant.*—*Bracton*, " therefore, mentions *homage* " as a method of *infranchise-* " *ment* equivalent to *manumis-* " *sion*, viz. Tenementum *nihil* " *confert—personæ, nisi præce-* " *dat homagium vel manumissio.* " Vid. Bract. lib. 2. cap. 8. " sect. 1. fo. 24. b. And this " seems to be the true sense " of *Littleton*, sect. 206, 207. " where it is said, that if the

" had hitherto been allowed to possess merely as " the scanty supports of their base condition; and " which they were still suffered to retain upon " the like services, as they had in their former " servitude been used and employed in: But " this possession, as now cloathed with *fealty*, " and by means thereof advanced into a kind " of tenure (*i*), differed very much from the an- " cient servile possession, and was from hence- " forth called *villenage* (*k*)."

" Our *Saxon* ancestors again having, as above,

" lord give his *Villein* any lands " in *fee simple, fee tail, for* " *life*, or *for years*, it is an *in-* " *franchisement*; but that a " lease at will is not. The " reason is plain, because a " mere tenant at will is not " admitted to *fealty*; whereas " *fealty* is incident to every " other estate, whether in *fee*, " for *life*, or for *years*.

" (*i*) Vid. Leg. Will. I. cap. " 29, 33.

" (*k*) Such tenant seems to " have been first called *Vilain* " in the *French* Laws of *Wil-* " *liam* I. (cap. 29.), possibly " from the Latin word *vilis* " *(Vid. Cowel Interp. and Skin-* " *ner, Etymolog. ad Verb. Vil-* " *lain)*. He was, however, in " the Latin of those times, " called *Villanus, a Villa, quia* " *in Villa habitavit, et operibus* " *rusticis*, plerumque sordidis, " *exercebatur*. Vid. Spelm. " Gloss. ad Verb. Villanus, and " 1 Inst. 116. a. Such tenant " had no freehold by the course " of the common law, (Lit. " sect. 81.) no vote in the " making of laws. *(Bacon,* " *Hist. of the Eng. Gov. 56.)* " nor could he, before the sta- " tutes 1 Rich. 3. cap. 4., 11 " Hen. 7. cap. 26., and 19 " Hen. 7. cap. 16., be a jury- " man. (Vid. LL. Hen. 1. cap. " 29.) Nor was he really of " any account in the state; " *Propriety* being the basis of " a feudal policy in *England*, " and of all the rights as well " as obligations consequent to " it.

" submitted to the feudal law, which was a law of " liberty, may be supposed to have imitated, " some sooner than others (*l*), the generosity of " the *Normans*, and to have done the like: but " neither did our *Saxon* or *Norman* ancestors " mean to increase or strengthen the possession " of their villeins, but meant to leave that altoge- " ther as dependent and precarious as before, " save only that, as by their admission to *fealty*, " their possession was put, in some measure, " upon a feudal foot, their lords could not, in " regard to the *fealty* implied on their parts (*m*), " deal with them so wantonly as before; nor " could they, so long as they answered the ser- " vices and conditions of their possessions or te- " nure, in honour or conscience, deprive or re- " move them (*n*): and yet they were for a long " time left merely to the conscience of their " lords (*o*), which they might, as they could,

" (*l*) *Sub Ricardo secundo pars* " *servorum maxima se in liberta-* " *tem vindicavit.* (Vid. Spelm. " Gloss. ad Verb Lazzi, & " Somn. Treat. of Gav. 58.) " And yet there were *bondmen*, " or, as then called, *villeins*, in " the time of Hen. 7, as ap- " pears from the Stat. 19 H. 7, " cap. 15.

" (*m*) The obligations of " *fealty* being mutual.

" (*n*) In this respect there- " fore Sir H. Spelman, speak- " ing of the infant state of " feuds, when they were preca- " rious and arbitrary, says truly " that, *Priscam eorum Naturam* " *admodum, apud nos hodie ex-* " *primit terrarum conditio, quæ,* " *ut loquuntur Forenses nostri,* " *tenentur ad voluntatem per* " *copiam Rotulorum curiæ vulgo* " copyholds *nuncupatæ.* Vid. " Spelm. Gloss. ad Verb. Feu- " dum & Felonia, & L L. Will. 1. " cap. 33.

" (*o*) Until the time of

" awaken by their petitions, but could not other-
" wise deal with; until the uninterrupted bene-
" volence and good nature of the successive lords
" of many manors, having time out of mind per-
" mitted them, or them and their children, to
" enjoy their possessions in a course of succes-
" sion, or for life only, became at length cus-
" tomary and binding upon their successors (*p*),
" and advanced such possession into the legal
" interest or estate we now call *Copyhold* (*q*);
" which yet remains subject to the same servile
" conditions, and forfeitures, as before, they being
" all of them so many branches of that conti-
" nuance or custom, which made it what it is.

" From this view of the original and nature of
" *copyholds*, we may possibly collect the ground
" of the great *variety* of *customs*, that influence
" and govern these estates in *different* manors; it
" following from the preceding account, if true,

" Edw. 4, and perhaps for some
" time after, it appearing by
" *Littleton*, (Sect. 77.) that it
" was, even in his time, doubted,
" whether a copyholder had any
" legal remedy against his lord.

" (*p*) In some manors as
" early as Henry 3d's time.
" *Vide Calthrope's Reading*, &c.
" 3, 4, 7.

" (*q*) Copytenants, copy-
" holders, or tenants *per* copy—
" *d'ancient temps fuer appelles*
" *tenants en villenage—& ceo*
' *appiert per les aunciennes te-*
" *nures*, &c. F.N.B. 12. C.
" Vide Bro. Tit. Villenage, 63.
" —Tenants at will, by copy of
" court roll, being in truth
" *bondmen* at the beginning,
" but having obtained freedom
" of their persons, and gained
" a custom by use of occupying
" their lands, they are now called
" copyholders, and are so pri-
" vileged, that the lord cannot
" put them out, and all through
" custom. *Bacon, Use of the*
" *Law*, 43.

" that they are no other than customary estates,
" after the ancient will of the first lords, as it is
" preserved and evidenced by the Rolls, or kept
" on foot by the constant and uninterrupted
" usages of the several manors wherein they
" lie (*r*)."

The correctness of the above conclusions of Mr. Justice Blackstone and Sir Martin Wright, was questioned by the late Lord Loughborough, who, in *Grant* and *Astle*, (3) observes, " that co-
" pyhold tenures are agreed, by all writers, to
" be more ancient than the *Norman* government.
" In some of the most approved authors, (he adds,)
" the copyhold tenure of land is derived from the
" state of *villeinage*, which now happily forms a
" very obscure title in the law. It is supposed,
" that all copyholders were originally villeins,
" and that, by the mitigation of villeinage, and
" the progress of enfranchisement, the estate grew,
" by degrees, to be more free and permanent, till
" it came into the condition of a copyhold. I
" cannot help doubting," continues his lordship,
" whether that deduction is not founded in mis-
" take. The circumstance which first led me to
" entertain the doubt is, that, in those parts of
" *Germany* from whence the *Saxons* emigrated
" into *England*, there exists, *at this day*, a species
" of tenure exactly the same with our copyhold
" estates, and that there exists likewise, *at this*

" (*r*) This I take to be the " sense of *Littleton*, Sect. 73, " 75, 77. *Sed Quære.*"

(3) 2 Dougl. 724. n.

" *day*, a compleat state of *villeinage*; so that both " stand together, and are not one tenure growing " out of another, and, by degrees, assuming its " place. In *East Friezeland*, the duchy of *Brunswick*, and other northern parts of *Germany*, " there are villeins in gross, and villeins regardant, with the same rigour which our law formerly knew. There are also copyhold tenants, " who are freemen, but whose estates are alienable only by licence, and are transmissible by " descent; and, in both instances, they must pass " through the courts of the lord. Nay, in the " ancient seat of the *Anglo-Saxons*, there exists, " at this day, that peculiar descent to the youngest " son, which we call *Borough English*; of which " the name shews the original.

" What I have stated I found in a very accurate " treatise of German law by *Selchow*, one of the " professors of the university of *Gottingen*, entitled ' *Elementa Juris privati Germanici.*'

" This seems sufficient to negative the idea that " copyholders sprang out of villeins. In *England*, " villeinage has ceased, and copyholders remain; " but here, as in other countries, they both prevailed at the same time.

" It is not difficult to conceive, that, whenever " agriculture became an object of respect in the " northern and western parts of *Europe*, those who " applied themselves to the cultivation of land, " though inferior in point of dignity, would be " equal in point of freedom, to those whose only

" profession was arms. The copyhold tenants " were husbandmen; their persons were free; " and, in that respect, they were as much above " the villeins, as, in point of consequence, they " were inferior, in a military age, to those who " had arms in their hands. Their lands were " held of a lord who could defend them, and who, " in return for that defence, was entitled to cer- " tain profits and advantages, founded upon pac- " tion express or presumed."

I shall only add on this subject, that authorities are not wanting to induce the supposition, that all lands in England were of *gavelkind* tenure before the conquest. C. J. Holt, in *Clements* v. *Scudamore* (4), thus concurs in that idea: " Though " Lord Coke," (he says) " be of another opinion, " yet it appears, from the best authors, as *Lam-* " *bard's Saxon Laws, inter leges Gulielmi Primi,* " 36. fo. 167, and *Selden in Eadm.* 184., that all " the lands in *England* were at first, and before the " conquest, in nature of gavelkind, and descended " equally to all the issue; but this was soon after- " wards altered, when tenures by knight's service " were introduced for the defence of the realm; " for then, in order the better to preserve the " family and tenure, the descent was restrained " only to the eldest son; but yet, notwithstand- " ing this alteration, the right of representation " continued to take place; and, by the common " law, if the eldest son happened to die in his

(4) 1 P. W. 64. 2 Lord Raym. 1024. *Vide* also *Black-* *borough* v. *Davis,* 1 P. W. 49.

" father's life time, leaving issue a daughter, the " inheritance descended to her in preference to " any of the other sons, so that the female, by " way of representation, was yet preferred to the " males, because the right of representation was " not altered. This right of representation (he " adds) is not peculiar to the laws of *England*, but " has prevailed by the laws of *other countries*; as " may be seen in (*a*) Numb. chap. xxvi. v. 33. and " chap. xxxvi. For though by the *Jewish Law*, " the males inherited exclusively of the females, " and the eldest son had a double portion of his " father's estate, which was confined to him as " the first begotten, yet we find when *Zelophehad* " the son of *Hephir* died, leaving no sons, but " *daughters*, and the daughters came unto *Moses* " claiming the possession of their father, this being " a new case, *Moses* is said to have brought their " cause before the *Lord*, who commanded him to " give them the possession of their father; so that " it was here determined, that they should take " the double portion that belonged to their father, " as the eldest son, *by right of representation*.

" So is *Selden de successionibus apud Hebræos*, " cap. 23. The same law (he continues) was part " of the twelve tables, and from thence came to " be observed among the *Romans*; and here in " *England* the right of representation holds as " well in case of inheritances descendible by " custom, as by the common law."

(*a*) Hale's Hist. of the Common Law, p. 210.

We will now proceed to a consideration of the distinguishing properties of copyhold tenure.

Incidental Qualities.

A copyholder has, in judgment of law, but an estate at will (5), yet by custom copyhold tenements may be descendible; and the descent of copyholds of inheritance is guided by the maxims and rules of the common law (6); therefore, when a man hath a copyhold by descent from his mother's side, if he die without issue, the land shall go to the heirs *ex parte maternâ*, and shall rather escheat to the lord, than go to the heirs *ex parte paternâ*.

And in copyholds, as in freeholds, the heir takes by descent, and not by purchase, where the two rights meet in him (7). But the descent will be prevented by a surrender or devise to customary heirs, by words creating a joint tenancy,

(5) 4 Co. 21. a. 126. b. Co. Litt. 60. a. Cro. Jac. 260. Willes, 325. 3 Burr. 1543.

(6) Co. Cop. s. 50. Tr. 116. *Brown's* case, 4 Co. 22. a. *Brown* v. *Dyer*, 11 Mod. 98. S.C. Holt, 165. *Roe* d. *Crow* v. *Baldwere* and others, 5 T.R. 104.

(7) *Smith* v. *Trigg*, 8 Mod. 23. S.C. 1 Stra. 487. *Allen* v. *Palmer*, 1 Leo. 101. *Vide* also *Hedger* v. *Rowe*, 3 Lev. 127. *Redding* v. *Royston*, 1 Comy. 123. S.C. 2 Lord Raym. 829. S.C. 1 Salk. 242. *Clarke* v. *Smith*, Lutw. 793. S.C. 1 Salk. 241. S.C. 1 Comy. 72. (and see the pleadings in S.C. Nels. Lex. Man. App. pl. 36.) *Counden* v. *Clerke*, Hob. 30. *Preston* & *Holmes*, Sty. 148. *Hurst* and another v. *Earl of Winchelsea* et al. 2 Burr. 879. S.C. 1 Sir W. Bl. Rep. 187. Watk. on Desc. 174. *Doe* & *Timins*, 1 Barnew. and Ald. 530.

or in the character of heirs of another person (8), though not by a charge on the land, that not altering the tenure (9).

There is also the same *jure representationis* in the case of inheritances descendible by custom, as by the common law (10).

The rules, by which the course of descent is continued or broken in respect to freeholds, apply equally to copyholds, where the lord cannot be prejudiced; so in *Roe* d. *Crow* v. *Baldwere and others* (11), the court held, that such part of a freehold and copyhold estate, which the person suffering a recovery took by purchase, must go to the heir *ex parte paternâ;* and that which she took by descent from the maternal ancestor, to the heirs *ex parte maternâ.*

And in *Doe* d. *Harman et ux.* v. *Morgan* (12), it was ruled, that a conditional surrender in fee by a person seised *ex parte maternâ*, and admittance of the mortgagee, will break the line of descent, like a feoffment and refeoffment (13), and that the estate will go to the heir *ex parte paternâ.*

There may be a *possessio fratris* of a copyhold even before admittance (14), but it can only

(8) Anon. Cro. Eliz. 431. *Swaine* v. *Burton*, 15 Ves. 365.

(9) 1 Lord Raym. 728. Stra. 1270. 2 Burr. 880. Watk. on Desc. 174. c. 5. 2 P. W. 135. *Clarke* v. *Smith*, sup.

(10) Ante, p. 36-7.

(11) 5 T. R. 104. and see *Martin* d. *Tregonwell* v. *Strachan* and others, cited *ib.* 107. Willes, 444; see also Cruise on Recov. 306.

(12) 7 T. R. 103.

(13) Co. Litt. 12. b. *Price* v. *Langford*, 1 Show. 93. S. C. 1 Salk. 337. S. C. Carth. 141.

(14) *Brown's* case, 4 Co. 22. b. Dy. 291. b. pl. 69. Cary, 7.

be on an actual possession; therefore it will be prevented, I conceive, by a lease for years with license. So where the husband was seised in right of his wife, and he and his wife, by license of the lord, made a lease for years by indenture rendering rent; they had issue two daughters, and the husband died; the wife took another husband, and they had issue a son and a daughter, the husband and wife died; the son was admitted to the reversion and died without issue; and it was held, that the reversion should descend to all the daughters, for that the possession of the lessee was not the possession of the copyholder (15).

There is, however, a contrary determination in *Moore* (16); but that has been supposed to be a misprint (17).

Bullock v. *Dibley*, Mo. 597. *Clarke* v. *Pennifather*, 4 Co. 23. b. Mo. 125. pl. 272, in *Holmes* & *Facie*. Ib. 272. pl. 425, in *Ever* v. *Aston*. *Horewood's* case, and *Stegnes's* case, cited Kitch. 160. Dal. 110. pl. 1. 16 Eliz. Lit. Rep. 234. Co. Cop. s. 41. Tr. 94-5. Ib. s. 50. Tr. 116. 4 Bro. Ch. R. 525.

(15) 3 Leo. 69. 4 Leo. 38, 212. And see *Brown's* case, sup.; and Co. Litt. 14. b. n. 6. Ib. 15. a. n. 2. Vide also *Blackburn* & *Graves*, 1 Mod. 102, 120. 3 Keb. 263.

(16) P. 125. pl. 272. *Holmes* & *Facie*; and see Vaill. Dy. 291. b. pl. 69. n. Co. Cop. s. 41. Tr. 95. (Supp. s. 5.) And see Gilb. Ten. 158-9. who also conceives, that the possession of the lessee by license, is the possession of the copyholder, and will not prevent a *possessio fratris*; but in Co. Cop., as above, it is suggested, that the determination of the lease and the subsequent death of the immediate heir, without entry, will exclude a *possessio fratris*. Et vid. Gilb. Ten. 161-2.

(17) 6 Vin. Ab. Cop. (D. b.) pl. 2. n.

And, according to the decision in *Foxe* v. *Smith*(18), a *possessio fratris* will also be prevented by the possession of the wife when intitled to free-bench: in that case, a copyholder who was seised of lands descendible according to the custom of gavelkind, died, leaving issue a son by one venter, and a son and daughter by another venter, the wife entered into a moiety, and the two sons into the other moiety, and the sons were admitted to the reversion of the wife's moiety; then the son by the second venter died, and afterwards the wife died, and it was adjudged, against the defendant, the daughter, that there should not be a *possessio fratris*(19).

The possession of the customary guardian, or of a termor by surrender, will be sufficient to constitute an actual possession, and to exclude the sister or brother of the half blood(20); and as there might be a *possessio fratris* of a use at

(18) 1 Freem. 45. *Brown* v. *Dyer*, ubi sup.

(19) Mr. Watkins, in his treatise on Descents, p. 154. n. makes a query as to the authority of this case.

(20) Co. Cop. s. 41. Tr. 95. Cary, S. 6 Vin. Cop. (D. b.) pl. 3. Ib. (C. e.) *Batmore* or *Blackborough et ux.* v. *Graves*, 1 Vent. 261. 3 Keb. 329. 2 Lev. 107. And see *Goodtitle* d. *Newman* v. *Newman*, 3 Wils. 516. S. C. 2 Sir W. Bl. Rep. 938. Dy. 291. b. 292. a. 4 Bro. Ch. Rep. 524. *Doe* d. *Barnett* and others v. *Keen*, 7 T. R. 386: in the last case it was decided, that the entry of the guardian in socage, of the daughter by a second wife, constituted a sufficient seisin in an infant daughter by a former wife, to create a *possessio fratris*.

common law (21), so I apprehend it is allowable of a trust of copyholds.

Collateral Qualities.

But the collateral qualities, incident to estates at common law, and which do not concern the descent, have no relation to copyhold inheritances, except by special custom (22), therefore, a descent of copyhold land, will not toll the entry of him who has a customary right to it (23); nor will the surrender of a copyhold by tenant in tail (24), or by a husband seised in right of his

(21) Gilb. Uses, 237-8.

(22) *Brown's* case, 4 Co. 22. a. *Cocks* v. *Darson*, Hob. 215, 216. S. C. Noy, 27. *Bird* & *Kirke*, 1 Mod. 200.

(23) *Gravenor* & *Ted*, 4 Co. 23. a. *Brown's* case, sup. *Lee* & *Brown*, 1 Roll. Abr. 629. (N.) *Joyner* v. *Lambert*, Cro. Jac. 36. Mar. 6. pl. 13. *Doe* & *Danvers*, 7 East, 321.

(24) *Bullen* v. *Grant*, Cro. Eliz. 148. S. C. 1 Leo. 174. *Gooles* v. *Grane*, Mo. 597. *Oldcot* v. *Levell*, Mo. 753. *Knight* v. *Footman*, 1 Leo. 95. *Lane* & *Hills*, 35 or 37 Eliz. (cited in *Royden* & *Moulster*, Godb. 368. pl. 458.) 1 Hughes' Abr. 459. *Dell* & *Rigden*, or *Higden*, 4 Co. 23. a. S. C. Mo. 358. pl. 488. *Rogers* v. *Powel*, Brownl. 36. *Clun* v. *Pease* & *Turner*, Cro. Eliz. 391. Co. Litt. 60. a. (n. 3.) cites the last case, and *Franklyn* & *Myn*, Hal. MSS. See also Supp. Co. Cop. s. 12. Tr. 184-5. Sed vide *Erish* v. *Rives*, Cro. Eliz. 717. *Hill* v. *Morse* [or *Upcheir*, or *Upchurch*], Mo. 189. Brownl. 121. 1 Roll. Abr. 506. B. pl. 1. *Stephens* v. *Eliot*, Cro. Eliz. 483-4. Arg. in *Willion* v. *Berkley*, 4 Eliz. 6 Vin. Cop. (G. e.) pl. 3. *Gurrey* v. *Sanderson*, Cro. Eliz. 907. (but the point was not resolved in the latter case.) And note, that although a surrender is not a disconti-

wife(25), cause a discontinuance; neither shall the wife be dowable, or the husband be tenant by the curtesy(26).

Copyholds are not affected by an extent(27), nor by a judgment at law(28), for no process

nuance, yet it will bar the issue and remainder men, when a recovery is not required by the custom of the manor. Vide post.

It has been said, that when the custom warrants a recovery, it will be a discontinuance. *Eylet* v. *Lane* & *Pers*, Cro. Eliz. 380. *Dell* & *Rigden*, or *Higden*, sup. Gilb. Ten. 189. But the better opinion is, that a recovery is more properly a bar than a discontinuance. *Morris's* case, Hil. 8 Jac. 2 Danv. 577. E. pl. 1. S. C. 1 Roll. Abr. 506. B. pl. 2. Vide also *Clun* v. *Pease* & *Turner*, Cro. Eliz. 391-2. And this, principally, because the doctrine of warranty does not extend to copyholds. See Godb. 368. *Eylet* v. *Lane* & *Pers*; *Clun* v. *Pease* & *Turner*, sup. Cru. Dig. 4 vol. p. 431. tit. 'Deed.' Vide also *Goodtitle* v. *Morse*, 3 T. R. 368. *Brown's* case, 4 Co. 23. a. And see the case of *Dell* & *Higden*, in 1 Roll. Abr. 506. B. pl. 2. Gilb. Ten. 191.

And for the effect of a warranty by a tenant in tail of freehold lands, vide *Doe* d. *Hutchinson* v. *Prestwidge*, 4 Mau. & Sel. 178. *Goodtitle* & *Morse*, sup. Cru. Dig. as above, and N. B. it is a good custom, that feoffment by tenant in tail with warranty, shall not be a discontinuance. 1 Roll. Abr. 562. (I.) pl. 2. cites 30 Ass. pl. 47.

(25) *Bullock* v. *Dibley*, 4 Co. 23. a. S. C. Mo. 596. S. C. Poph. 38. *Knight* & *Footman*, 1 Leo. 95. *Wright* v. *Portman*, 4 Co. 23. a. But see *Collins* v. *Cancke*, Cro. Jac. 105.

(26) *Brown's* case, sup. *Shaw* & *Thompson*, 4 Co. 30. b.

(27) *Drury* v. *Man*, 1 Atk. 95. *Rex* v. *Lord Lisle*, Parker, 195. Lex Cust. 19. But a lease with licence is extendible at law, post, tit. 'Licence to demise, &c.' Yet see contra *Pictoe's* case, 1 Roll. Abr. 888.

(28) Per Harcourt C. in *Cannon* v. *Pack*, P. 13 Ann. Canc. 6 Vin. Cop. (O. e.) pl. 6. *Rex* v. *Budd*, Parker, 190. Supp. Co. Cop. s. 21. Tr. 215. Lex Cust. 19.

can issue to levy a debt upon a copyhold estate (29); nor can copyholds be seised upon an outlawry (30); nor are they assets for specialty debts, not even for the debts of the Crown (31); but they are within the rule established in equity for marshalling assets; so that if A. has a mortgage of freehold and copyhold estates of B., and C. has a mortgage of the freehold estates only, and is also a specialty creditor by bond of B., A. would be thrown on the copyhold estate only, to which C. had no resort, or C. should stand in his place (32).

There can be no general occupant of copyhold estates, since the freehold is never out of the lord, therefore, on a grant to A. for the lives of B., C., and D., the lord shall have the land again on the death of A (33).

(29) But a sequestration on a decree in equity, would seem to be an exception to this rule, though it is doubtful whether it would be revived against the customary heir. *Whitehead* & *Harrison*, 2 Eq. Ca. Abr. 713. 1 Barnard. B. R. 431.

(30) *Rex* v. *Budd*, sup. But see 1 Leo. 99, in *Saliard* & *Everat*.

(31) *Brown's* case, ubi sup. *Robinson* v. *Tonge*, 1 P. W. 680. (n.) *Aldrich* v. *Cooper et al.* 8 Ves. 388, 394.

(32) *Aldrich* & *Cooper*, sup. *Kidney* v. *Coussmaker*, 12 Ves. 154. Duke's Char. Uses, by Bridgm. 190. Post, tit. 'Election.' But see *Robinson* v. *Tonge*, sup. It should seem that when a freehold estate is devised to the heir at law, although he takes by descent, yet, if the personalty is exhausted in payment of debts, the rule as to marshalling assets, is not extended to legatees, so as to throw them on the real estate. *Scott* v. *Scott*, Ambl. 383.

(33) *Ven* v. *Howell*, 1 Roll.

But there may be a special occupant of copyholds (34).

And as the collateral incidents of estates do not extend to copyholds without special custom, the lord has no power over the lands of a lunatic, unless by custom (35); therefore, in *Cocks* v. *Darson* (36), where the lord had granted the

Abr. 511. (L.) pl. 3. *Smartle* v. *Penhallow*, ante, p. 34. *Zouch* d. *Forse* v. *Forse*, 7 East, 186. Post, tit. 'Statutes.'

(34) Co. Litt. 41. b. n. 3. Co. Cop. s. 56. Tr. 128. *Doe* d. *Lempriere* v. *Martin*, 2 Sir W. Bl. 1148. And see *Howe* v. *Howe*, 1 Vern. 415. *Rundle* v. *Rundle*, 2 Vern. 264. *Withers* v. *Withers* and others, Amb. 151.

(35) See Dy. 303. a. pl. 46, where it appears, that an idiot could not be ordered in the court of wards for his copyhold, but in the court of the lord of the manor. Vide also Vaill. Dy. 303. a. N. who states, that the rule of the Court of Wards was, that if an idiot had not any goods or chattels, or lands, except copyhold lands holden of a common person, the king should not have the custody, but the lord of whom the copyhold was holden; but if he had any other, then the copyhold land also; cites E. 13 Eliz. *John Roger's* case, C. W. fo. 74. And in *Eavers* v. *Skinner*, Cro. Jac. 105, it was decided, that the lord should have the custody of one who was *mutus & surdus*, the reason given for which was, that he would otherwise be prejudiced in his rents and services. And see Gilb. Ten. 308. Vin. tit. 'Lunatick, Non Compos, and Ideot.' Post, tit. 'Statutes.'

(36) Hob. 215. S. C. Noy, 27. Poph. 141. Vide also *Drury* v. *Fitch*, Hut. 16, 17. 1 Vern. 262. Ca. Temp. Talb. 143. 15 Vin. Lunatick, (B.) (C.), by which authorities it seems to be established, that the committee of a lunatic hath no interest whatever, but a bare custody or authority. But see ante (n. 35). 1 Ch. Ca. 19, 113, 153-4.

Nota. By 43 Geo. 3. c. 75, and 59 Geo. 3. c. 80, and by the equity of the statute

custody of a lunatic's copyhold land, the court held, that an action touching the land was to be brought in the name of the lunatic, for that no interest was gained in the land by such a commitment.

And it is only by special custom, that the lord may appoint a guardian to an infant, but by custom he may do so, or give the custody to his bailiff(37).

And by 9 Geo. 1. c. 29.(38), the lord, after proclamation made in the manner therein directed, may appoint a guardian to an infant, for the purpose of admittance.

CUSTOM, it has been emphatically said, is the

4 Geo. 2. c. 10. (see the Appendix), certain powers over the estates of a Lunatic, are given to the committee, under the controul of the Court of Chancery.

(37) *Clench* v. *Cudmore*, Lutw. 1187. S.C. 3 Lev. 395. Kit. 202. 6 Vin. Cop. (A. e. 3.) *Cocks & Darson, Drury & Fitch*, sup. *Sowper* v. *Goodbody*, Dy. 302. b. *The King* v. *the Inhabitants of Wilby*, 2 Maul. & Sel. 508-9. *Wade* v. *Baker & Cole*, 1 Lord Raym. 131. It has been said, that by custom the lord may assign one to take the profits of a copyhold descended to an infant, during his nonage, to the use of the assignee, without rendering an account. 1 Leo. 266. Ca. 357. Sir Edward Coke says, "Where, by the custom of the manor, the bailiff of the manor is to have the wardship of the copyhold heir, being under the age of 14, such a guardian shall neither be admitted, nor pay a fine, because he is but a partner [pernor] of the profits; and that not in his own right, but in the right of him to whom he is guardian." Co. Cop. s. 56. Tr. 128.

(38) See the Appendix.

life and soul of copyhold tenure, and in illustration of that dictum, I propose now to treat more fully of some few qualities, inherent in frank tenure, either by the common or statute law, but which, (as I have already shewn,) prevail only as to copyholds by the custom of particular manors. And first, as to

ESTATES TAIL.

Whether or not copyhold lands can, strictly speaking, be intailed as freehold lands may be, has been the subject of much legal doubt and controversy.

The grant of feuds to a man and the heirs of his body, is admitted to have been very common, even before the statute *de donis*, 13 Ed. 1. c. 1. which has been held not to extend to copyholds (39); and such a limitation in the case of copyhold land, would, I submit, both before and since that statute, create a fee simple conditional, unless by particular custom; that is, unless there was a custom in the manor allowing a remainder to be

(39) Cary, 30. Sav. 67, in *Heydon's* case. *Rowden* v. *Malster*, or *Royden* & *Moulster*, Cro. Car. 42. S. C. 2 Roll. Rep. 383. S. C. Godb. 368. pl. 458; cites *Pits* v. *Hockley*, P. 35 Eliz., and *Lane* & *Hills*, 37 Eliz. sed vide *Mancel's* case, Plow. Com. which is stated per Harvey J. in the report of *Rowden* & *Malster*, in Godb. to be the only authority to the contrary, yet see 6 Vin. Cop. (F. e.) pl. 18.

grafted on a limitation of the above nature, or empowering the copyholder to alienate before issue born (40). In *Roe* d. *Crow* v. *Baldwere* (41), Ld. Kenyon, C. J. said, that copyhold estates were not the subject of intails, unless there was a custom in the manor to warrant it; and in *Moore* v. *Moore* (42), the Chancellor (Lord Hardwicke) ruled, that it was necessary to shew a custom of creating an intail, and that it was not satisfactory to say, that because an estate might be surrendered in fee *vel aliter*, that it could be intailed under the statute of Westm. 2.; and that, to shew merely that copyhold lands had been granted to men and the heirs of their bodies, did not prove that an intail might be created; but to do that it must be shewn that there have been surrenders in tail *with remainders over*, (for otherwise that estate might be a fee simple conditional,) or that the lands had gone in course of descent,

(40) Co. Litt. 60. b.

(41) 5 T. R. 104.

(42) 2 Ves. 601. S. C. Amb. 279.; and see *Heydon's* case, 3 Co. 8. *Margaret Podger's* case, 9 Co. 105. *Bulleyn* & *Graunt's* case, 1 Leo. 175. (but see the report of S. C. Cro. Eliz. 149); *Warne* v. *Sawyer*, 1 Roll. Rep. 48. *Hill* v. *Morse*, [or *Upcheir* or *Upchurch*,] Mo. 189. pl. 336. *Vid.* also *Gravenor* v. *Brook* & others, Poph. 33. S. C. (*Gravenor* v. *Ted*,) 4 Co. 23. a S. C. (*Gravenor* v. *Rake*,) Cro. Eliz. 307. *Lee* v. *Brown*, Poph. 128. *Rowden* v. *Malster*, ubi sup. *Church* v. *Wyat*, Mo. 637. *Erish* v. *Rives*, Cro. Eliz. 717. *Hasting* & *Grey*, cited ib. *Taylor* v. *Shaw*, Cart. 22. 1 Sid. 268, 314.: but see *Adams* v. *Hincloe*, 11 Mod. 199. 4 Leo. 64. ca. 157. Godb. 20. Vide also *Gurrey* v. *Sanderson*, Cro. Eliz. 907.

according to the limitations, so long as to exclude the supposition of a fee simple conditional.

And in this case the Chancellor observed, that it was considered that before the statute *de donis*, there might be a custom in manors to create estates tail; and, indeed, from the observations that have fallen from several distinguished Judges, in early cases, I must presume, that such a custom was frequently found to have existed before the statute. At all events an immemorial existence of those privileges, which, under a limitation to a man and the heirs of his body, create a constructive estate tail, is very common, and has frequently availed in questions upon copyhold titles; so that where a remainder may be grafted on the limitation to the heirs of the body, which remainder is inconsistent with a fee conditional, or where the tenant is permitted by the custom to alien even before issue born, in prejudice to the right of reverter, an estate limited to a man and the heirs of his body, is in the nature of a fee tail at common law, since the statute *de donis*; and where, from a more jealous preservation of the right of reverter, such remainders are not allowed, or the power of alienation originates with the birth of issue, the estate is in the nature of a fee conditional (43).

The above conclusions are certainly in contravention to Lord Coke's position, that custom co-

(43) Cary 30. *Stanton* v. *Barnes*, Cro. Eliz. 373. *Pullen* v. *Middleton*, 9 Mod. 483. [5th Ed.] post p. 81-2. n.

operating with the statute may make an intail (44); but that observation has been very frequently repudiated (45).

The statute *de donis*, it will be recollected, enacted, that thenceforth the will of the donor should be observed, and that the tenant should have no power to alien so as to defeat either his issue or the donor; and I must submit, though with great diffidence, after so much legal and very learned controversy, that the perpetuity which the statute aimed at, was in itself a sufficient reason for considering, that copyholds were not intended to be included in it, and, consequently, that although a custom to create a fee simple, will warrant a grant to a person and the heirs of his body, yet that such a limitation will be a fee conditional, unless, as I have already observed, the privileges of an estate tail at common law, have grown out of the custom of the manor, under an immemorial usage.

This protecting statute it is well known was relaxed, and its purpose defeated, in respect to freehold lands, by the opposition made to the very great evil and inconvenience of estates being rendered unalienable, and which gave rise to the prac-

(44) Co. Litt. 60. a. b. 3 Co. 8. b. *Lee* v. *Brown*, Poph. 128.; and see 1 Roll. Abr. 506. (B). pl. 1. Lex Cust. 165, 166-7. *Warne* v. *Sawyer*, 1 Roll. Rep. 48. *Hastings* or *Haselrick* v. *Grey*, cited ib. 49. Cro. Eliz. 717.

(45) *Heydon's* case, 3 Co. 8. *Adams* v. *Hincloe*, 11 Mod. 199. *Rowden* & *Malster*, ubi sup. *Doe* d. *Wightwick* v. *Truby* & others, 2 Sir W. Bl. 946.

tice of considering fines and recoveries, as a bar to the issue of a person having an estate limited to him and the heirs of his body, and the latter as a bar also to those in remainder; and conformable to which practice in freehold cases, a recovery in the customary court baron, and a forfeiture and regrant, of which I shall presently speak, and, (as it has been said,) other acts, have been considered as bars in copyhold cases.

In some manors intails have been barred by surrender only (46), and in others both by surrender and common recovery; and it has been held, that the one mode is not inconsistent with the existence of the other in the same manor (47), and that even a surrender to the use of a will is sufficient, if the custom does not prescribe any particular mode of effecting a bar to intails (48). Another method of barring estates tail in copyholds is, for the lord to seise on a pre-concerted forfeiture, and then to regrant according to the desire of the copyholder, who may compel such regrant and avoid the mesne acts of the lord (49).

The practice of effecting a bar to intails, whe-

(46) When an intail may be barred by surrender only, I apprehend that a remainder man in tail cannot effect a bar, before his estate falls into possession, except with the consent of the particular tenant, see 1 Bro. Ch. Rep. 586-8, in *Highway* & *Banner*.

(47) *Everall* v. *Smalley*, 1 Wils. 26. S. C. 2 Stra. 1197. *Doe* d. *Wightwick* v. *Truby* & others, 2 Sir W. Bl. 946.

(48) *Moore* v. *Moore*, 2 Ves. Sen. 601. S. C. Amb. 279. *Carr* d. *Dagwel* v. *Singer*, 2 Ves. 604.

(49) *Grantham* v. *Copley et al.* 2 Saund. 422. S. C. 2 Keb. 823.

ther by recovery, surrender, or forfeiture and regrant, has been alike attributed to the invention of our ancestors, in order to elude the statute *de donis*; but, still strongly inclined to maintain the opinion I have advanced, that customary estates in the nature of a fee tail, were common even before that statute, I would submit, (and I hope not to be thought too presumptuous in the inference,) that when the intail is barrable by surrender, the custom may be presumed to have existed before the statute; and that a recovery, and forfeiture and regrant, are devices for avoiding its arbitrary provision, founded on feudal principles. This opinion must, at least, be considered to receive no inconsiderable sanction from the observation of Sir William Blackstone (50), that, "About two "hundred years intervened between the making "of the statute *de donis*, and the application of "common recoveries to this intent, in the 12th "year of Edward IV. which were then openly "declared by the Judges to be a sufficient bar of "an estate tail."

The *custom of barring* estates tail by forfeiture and regrant, prevails in several manors in Yorkshire, and is the only one known to have been practised in those manors (51).

I have had occasion to consider the effect of a

Pilkington v. *Bagshaw*, Sty. 450. *Saunderson* v. *Stanhop*, 2 Keb. 127. S. C. 1 Sid. 314.; and see *Taylor* v. *Shaw*, Cart. 6, 22. Co. Cop. s. 48. Tr. 112.

(50) 2nd Vol. Com. p. 116.

(51) Ante (n. 49.)

bar to an intail and remainders over, the tenant in tail being a feme covert, and having an equitable interest only in remainder. The mode proposed was, for the tenant for life and the feme covert, to join in a lease for a short term, precisely on the plan adopted, when the tenant for life and person next immediately in remainder in tail, are the tenants to the lord, and where no coverture or other disability exists; and as an equitable intail may be barred, where a recovery is the customary mode, by the tenant for life and tenant in tail joining in a surrender to a tenant to the plaint, and pursuing the same forms, in all respects, as would be used if they had the legal estate, it may be urged, with some semblance of practical correctness, that a lease by tenant for life and tenant in tail in remainder, equitably intitled only, will effect a bar to the intail, where the custom of forfeiture and regrant prevails; but, unless it can be shewn, that the recovery and lease for barring an intail of copyholds, are declaratory acts only, and that the forms and principles which apply to a recovery of a freehold estate, or common law lease, are not essential or applicable in copyhold cases, I am not prepared to admit that, under a title so circumstanced, as that to which I am at present adverting, the intail and remainders would be considered to be barred, by the lease of the equitable tenant for life and feme covert equitable tenant in tail in remainder.

The ground of my objection applies equally

to a lease by a tenant for life and a feme covert tenant in tail in remainder, and to a lease by a feme covert tenant in tail in possession, and whether the estate tail is legal or equitable, a feme covert, I conceive, being incapable of granting a lease of copyholds, even by a fine at common law; so that some preconcerted act, tending to the disherison of the lord, would perhaps in the case of a feme covert, be the only mode of effecting a complete bar to the intail in those manors, where the act of forfeiture by the tenant, and a subsequent regrant by the lord, is the only one prescribed by the custom. This difficulty was overgot in the above instance, by joining the trustees (the tenants to the lord,) in the lease with the tenant for life and the feme covert and her husband, the wife being separately examined as to her consent to the lease, stating the intent of the forfeiture very fully upon the face of the lease: and in that case, there appeared to be no possible objection to the trustees joining in barring the intail and the remainders over, as the only contingent limitation was to the issue of the tenant for life, whose estate was to be restored under the regrant from the lord, and the remainders were all in favour of the tenant for life and feme covert. But where there are contingent trusts, it is possible that this mode might not meet with the assent of the trustees, and if they, in the exercise of their discretion, should not think it proper to join in giving effect to the wishes of the parties,

I conceive that a court of equity would not compel them to do so, although if they concurred, it would oblige a purchaser, it would seem, to accept the title.

This, I submit, is deducible from the case of *Biscoe* v. *Perkins* (52), in which Lord Eldon said, "the cases are uniform to this extent; that, "if trustees, before the first tenant in tail is of "age, join in destroying the remainders, they "are liable for a breach of trust; and so is every "purchaser under them with notice: but, when "we come to the situation of trustees to pre-"serve contingent remainders, who have joined "in a recovery, after the first tenant in tail is "of age, it is difficult to say more, than that no "judge in equity has gone the length of holding, "that he would punish them as for a breach of "trust, even in a case, where they would not have "been directed to join. The result is, that they "seem to have laid down, as the safest rule "for trustees, but certainly most inconvenient "for the general interests of mankind, that it is "better for trustees never to destroy the remain-"ders, even if the tenant in tail of age concurs, "without the direction of the court.

"The next consideration," added his Lordship, "is, in what cases the court will direct them "to join; and if I am to be governed by what "my predecessors have done, and have refused "to do, I cannot collect in what cases trustees "would, and would not, be directed to join;

(52) 1 Ves. & Beam, 491.

"as it requires more abilities than I possess, to "reconcile the different cases with reference to "that question. They all, however, agree, that "these trustees are honorary trustees; that they "cannot be compelled to join; and all the "judges protect themselves from saying, that, "if they had joined, they should be punished; "always assuming, that the tenant in tail must "be twenty-one."

And the purchaser, in that case, resisting the title, on the ground that trustees to preserve contingent remainders joining in a recovery with the first tenant in tail, who had attained twenty-one, were guilty of a breach of trust, was compelled to perform his contract.

Even a devise was held, in one particular case, to be a bar to an intail(53): in that case the equitable tenant in tail had requested the trustees to surrender the legal estate, and afterwards filed a bill in chancery to compel them so to do, and the lord refusing to accept a surrender from him, because the legal estate was in the trustees, he made his will, and devised the estate to his wife for life, remainder to her children by a former husband; and the court decreed against the coheirs in tail of the testator.

And where the customary mode of barring intails is by forfeiture and regrant, and the lord

(53) *Otway* v. *Hudson* and others, 2 Vern. 583. And see 2 Atk. 526. *Pullen* & *Middleton*, 9 Mod. 483. [5th ed.]

will not aid the desire of the tenant in tail to unfetter the estate, a surrender or devise only, I conceive, would be sufficient.

It would appear to be settled, that, where the custom is silent as to the mode of barring intails, a surrender is the only proper act, a recovery, and forfeiture and regrant, requiring a custom in support thereof(54); consequently, where intails are barrable both by surrender and recovery in the same manor, the former is most adviseable(55), unless, indeed, there should have been more frequent instances of barring by recovery, and those comparatively of a more ancient date(56), and then it would seem that a surrender would not do.

In *Roe* d. *Bennett* v. *Jeffery*(57), the question at the trial before Heath, J. at the assizes for Sussex, was, whether there was a custom within the manor to bar intails by surrender; and the defendant proved one instance in support of that custom; but there was also proof, on the part of the plaintiff, of one instance of a recovery by

(54) *White et Ux. et al.* v. *Thornburgh et al.* 2 Vern. 705. S. C. Gilb. Eq. Rep. 109. S. C. 2 Eq. Ca. Abr. 714. Pre. Ch. 425. *Otway* & *Hudson*, ante. *Snow* v. *Cutler*, 1 Lev. 136. S. C. 1 Sid. 153. S. C. 1 Keb. 567, 752, 800, 851. S. C. Sir T. Raym. 164. *Carr* d. *Dagwel* v. *Singer*, 2 Ves. 604. *Martin* d. *Weston* v. *Mowlin*, 2 Burr. 979. Skin. 307. But see *Lee* v. *Brown*, Poph. 129.

(55) See Lofft, 398. *Everall* v. *Smalley*, 1 Wils. 26. S. C. 2 Stra. 1197.

(56) See *Doe* & *Truby*, 2 Sir W. Bl. 947.

(57) 2 Mau. & Selw. 92.

a tenant in tail. Upon this evidence the learned judge directed the jury to find for the defendant; and, on a motion for a new trial, the Court of King's Bench held, that, although one act undisturbed does not make a custom, yet it might be evidence to prove the custom, as in *Doe* & *Mason* (58): Dampier, J. added, that if frequent instances of barring by recovery had been proved, *which is inconsistent with the mode by surrender*, there would have been weight in the argument, that the single instance of a surrender did not support the custom.

This observation may, perhaps, be thought to imply, that even a surrender requires a custom (59), but, I submit, that it was only intended to convey the opinion of the learned judge, that when intails have been barred both by surrender and recovery, in the same manor, the only proper mode is a recovery, if that has been frequent, and there is a single instance, or only a paucity of instances, of effecting a bar in any other way.

The case of *Grayme* v. *Grayme* & *Elton*, decided by Lord Chancellor Apsley in 1763, and cited by Mr. Watkins (60), is an authority for considering, that if a tenant in tail of a trust of copyholds, accepts a surrender of the legal

(58) 3 Wil. 63. ante p. 35.

(59) And see *Church* v. *Wyat*, Mo. 638. 1 Roll. Abr. 506. (B.) pl. 1.

(60) 1 vol. Cop. 179.

estate, it will bar the intail and remainders over; and this doctrine receives some sanction from the case of *Otway* & *Hudson* (61); but it must be recollected, that, in the latter case, the intent to acquire a fee simple was not only evident, but that the tenant in tail did every thing in his power to effect a bar, by the forms prescribed by the custom of the manor.

It is clear that in freehold cases, whilst the legal and equitable estates remain distinct, the *cestui que trust* can only bar the intail and remainders, by the same acts as would be good if the estate were legal, and that evidence only of an intention to acquire and pass a fee simple, as by a devise, which was formerly held to be sufficient (62), would not be so now (63).

When an intail may be barred by surrender only, it is probable that a court of equity would deem a surrender of the fee simple, from the trustee to the *cestui que trust*, a sufficient bar to the intail, as in the case of *Grayme* & *Grayme*; but where the custom of the manor requires other forms to be pursued, to bar an intail of the legal estate, I apprehend that the court would not consider the union of the legal fee, with the

(61) Ubi supra.

(62) *Woolnough* v. *Woolnough*, Prec. Chan. 228.

(63) *Kirkham* v. *Smith*, Amb. 518. *Roe* d. *Eberall et al.* v. *Lowe et al.* 1 H. Bl. 451. *Bateler* v. *Allington*, 1 Bro. Ch. Rep. 72. *Legate* v. *Sewell*, 1 P. W. 87. *Salvin* v. *Thornton*, cited in the two last cases. And see *Radford* v. *Wilson*, 3 Atk. 815.

equitable intail, or any other act operating as a declaration of intention only, to be a bar of an intail of copyholds, unless indeed under very peculiar circumstances calling for the aid of the court, as in *Otway* & *Hudson*.

It is to be recollected, that the bargain and sale of commissioners of bankrupt, of a copyhold estate intailed on the bankrupt, is a bar to the issue in tail, and all remainders over, the stat. of 21 Jac. 1. c. 19. though not expressly mentioning copyholds, being held to extend to them (64).

There is still one other mode by which an intail of copyholds, and the remainders over, may be barred, which is by an enfranchisement by the tenant in tail (65).

It would seem that length of possession, and a consistent deduction of title to the fee simple, will create a presumption of an intail having been barred (66).

I have already shewn that a recovery of copyholds does not alter the course of descent, but that if the person suffering the recovery, should

(64). See also 1 Jac. c. 15. post, tit. 'Statutes.'

(65). *Challoner* v. *Murhall*, 2 Ves. Jun. 524. *Philips* v. *Bridges*, 3 Ves. Jun. 127-8. *Parker* v. *Turner*, 1 Vern. 393, 458. S. C. (called *Barker* v. *Turner*.) 2 Cas. in Chan. 174. *Dunn* v. *Green*, 3 P. W. 10. *Doe* d. *Reay* v. *Huntington* and others, 4 East, 283. But see *Bernard* v. *Simpson*, Clayt. Rep. 138.

(66). *Wadsworth's* case, Clayt. Rep. 26. Scroggs, of Courts, 95. *Roe* & *Lowe*, 2 H. Bl. 459, 461.

be intitled to part of the estate, by descent from the maternal ancestor, and to other part by purchase, the former will go to the heir *ex parte maternâ*, and the latter to the heir *ex parte paternâ* (67).

And according to *Dell* v. *Higden* (68), the recovery in value can only be of copyhold lands within the manor.

It is also proper to notice here, that equity will not relieve against an erroneous recovery of copyholds, or decree the lord of the manor to entertain a plaint, in the nature of a writ of error or false judgment, on a bill by a remainder man, after an intail spent for many years; though, if there is an error in any adversary proceedings in the customary court, equity will interpose (69).

And the reader is also referred to the act of 47 G. 3. sess. 2. c. 8. by which it will be seen, that a feme covert, as well as persons not being under coverture, may suffer a recovery in the customary court by attorney, to be constituted as is mentioned in that act.

(67) Ante, p. 56.

(68) Mo. 358. pl. 488.

(69) *Ash* v. *Rogle and the Dean and Chapter of St. Paul's*, 1 Vern. 367. Sho. Par. Ca. 67. *Patishal's* case. H. 8. Jac. Scac. 1 Danv. 750. *Edwards's* case. Lane 98, cites S.C. *Slade et Ux.* v. *Dowland* in false judgment, 2 Bos. & Pul. 575. *Christian* v. *Corren*, 1 P.W. 330. Vide also *Bell* v. *Cundall*, Amb. 101, where the Court of Chancery would not entertain a bill, to rectify an error in a recovery suffered of a copyhold estate, after the lapse of a great length of time, and as against a purchaser.

Mr. Watkins, after maintaining that intails may be effected in all manors, where a grant in fee simple is allowed, adds, "that it may be conceived "frequently prudent to avoid the opposition of "prejudice, or of a rigid adherence to what is "deemed law, as consecrated by certain cases "and precedents, (however numerous the cases "and precedents which may be adduced to the "contrary:) and, in order to effect this end, a *trust* "may be created, whenever the custom of the ma-"nor will warrant a grant in fee. For, whenever "such grants in fee are allowed, the copyholds, "which may be so granted, may be entailed in "effect: if not by custom at law, they may be so "in equity without it. For the custom only "binds the tenancy, and has nothing to do with "the trust. If a surrender be made to a person "and his heirs, and a trust be declared of such "estate to another and the heirs of his body, a "court of equity will see it observed. The trustee "and his heirs are tenants to the lord; and the "lord has nothing further to do with it. The "trust is between the tenant and the *cestuy que* "*use*, and solely the subject of equity (70)."

(70) 1 Vol. on Cop. 159; and at the end of that Chapter he gives the form of a deed by which such a trust may be created. The following note is added in the 2d Ed. "It has "been suggested to me, that "equity cannot call in the *legal* "estate, as the *legal* estate "could not be transferred to "one whom the custom does "not notice. But qu. whether, "if the legal estate could *not* "be transferred to the issue in

The expedient suggested by Mr. Watkins, in order to create an intail in *all* copyhold lands, has received the sanction of Mr. Gilbert Atherley, in his excellent treatise on Marriage Settlements(71); but I feel it a duty to suggest, (though with every due respect for these authorities,) that it ought not to be hastily adopted by any copyholder; for I am unwilling to believe, that a court of equity would sanction a device, the effect of which would be little short of assuming a power over the very existence of all established customs; a power which no court of law would or could exercise: indeed, it would be virtually subjecting the customs of a manor, so-far as they have for ages past regulated the descent and transmission of the copyhold property within it, to the caprice of every copyholder: I must at least be allowed to doubt, whether any gentleman at the bar would feel himself justified, in recommending a title so circumstanced; and I would ask, should the case ever occur, how the equitable intail is to be barred?

I am glad to find that I am not singular in the opinion, that the trust of a copyhold cannot be

" tail, the court of equity would " not in such case leave it in " the trustee, and make him " hold subject to the equity. " If no one can take the trust " who could not take the legal " estate, according to the above " suggestion, yet it must be " proved that an estate to A. " and the heirs of his body, is " not included in the power to " grant or limit in fee simple." (71) p. 564.

intailed, where an intail of the legal estate is not allowed; the contrary position is controverted by a gentleman much distinguished for his legal knowledge, both theoretically and practically (72).

(72) Preston on Conveyancing, 1 vol. p. 153 to 160. And see the case of *Pullen* & *Middleton*, 9 Mod. 483. [5th Ed.] There an estate was limited *to trustees*, to the use of A. and the heirs of her body; she married B. The lands were copyhold, and not capable by the custom of being intailed, so that no recovery could be suffered of them. The husband and wife by indenture of bargain and sale, to lead the uses of a recovery, declared that the lands should be to the use of the husband and his heirs; and afterwards suffered a common recovery in the court of Common Pleas. The question was, what effect the recovery had upon these copyhold lands. Lord Hardwick, C. said, that although by the custom of several manors copyhold estates could not be intailed, yet they were capable of such limitations as might make them fee simple conditional, and that it would make no difference that the wife was not seised of the legal estate, *as the trust estate of a copyhold could in no case be capable of an intail, where the legal estate was not*, it being necessary that there should be the same rule concerning property in law and equity, though as to the manner of conveying estates, some difference might be made. That a court of equity would in many cases dispense with the ordinary forms in passing estates, but never introduce any rules that might vary the nature of them at common law. The wife, therefore, being tenant of a fee simple conditional, had power to dispose of it by surrender after the condition was performed, *i. e.* after issue. And after adverting to the case of *Otway* & *Hudson*, his Lordship further observed, that a recovery suffered in the court of Common Pleas, would not have barred such a trust estate tail as this, supposing it to be an estate tail, unless the trustees had refused to surrender, &c. But taking this estate to be a fee simple conditional at common law, in trust for the wife,

The reader's particular attention is called to the observations adverted to, which conclude with the following interesting passages: "Lord "Chief Justice Bridgman (*Taylor* v. *Shaw*, Car- "ter 21.) [6, 22.] seems to have decided, that an "estate tail in copyhold lands, may be barred "by a fine, with proclamations, in the court of "Common Pleas. (*See also the observations of* "*Lord Hardwicke in Pullen* v. *Middleton*, "9 *Mod.* 484.) On this determination it is to be "remarked, that the lands are within the juris- "diction of that court (73), though they are more "properly impleadable in the lord's court, and

as it really was, after the condition performed, she might have devised it, had she been sole, by will, which would have operated as a good appointment of the trust. Being a feme covert, she had joined with her husband in executing a deed to make a tenant to the *præcipe*, and suffered a common recovery in the Common Pleas together with him, to the use of the husband and his heirs. Now it was certain that a feme covert might by a common recovery convey her fee simple land, as well as bar an estate tail; for she being secretly examined before the recovery was suffered, she was as effectually barred as she would be in the case of a fine. But besides this deed and recovery, the husband and wife had gone further; they had brought their bill in the Court of Chancery against the trustees to convey the legal estate, and a decree had been made for that purpose, which he was to suppose had been carried into execution; so that all had been done that could be done to transfer the estate to the husband. And he was of opinion that it was well transferred; and he did not see how the present case differed from the devise of a trust copyhold estate, which had always been held good.

(73) But see Cruise on Fines, 211, 212.

" in this respect they are under a different predi-
" cament from the lands of the tenure of ancient
" demesne. This point is noticed, as a means of
" avoiding the rapacity of some lords of copyhold
" manors, who refuse to permit equitable owners
" to suffer a recovery, or pass a surrender in the
" lord's court, without being admitted, or at least
" paying fines as if they were admitted."

" It is, however, to be observed, that some gen-
" tlemen, whose opinion is intitled to the highest
" respect, are not satisfied, that a fine of copyhold
" lands will bar the trust of a married woman in
" those lands; of course it is not safe to rely on a
" fine under these circumstances, though it is very
" proper that the point should be kept in mind,
" and whenever circumstances require it, pressed
" to a decision. Can a person claim any interest
" in copyhold lands in opposition to his own fine?
" Is he not estopped? That the decision will be
" in the support of the validity of the fine, is a
" point on which little doubt is entertained by the
" writer of these observations. The same point
" applies to alienation by married women of equit-
" able interests in copyhold lands. But it is not
" apprehended that a recovery in the courts of
" Westminster Hall will have the same effect as a
" customary recovery: since a *customary recovery*
" is the prescribed mode of barring an intail.
" *Oliver* v. *Taylor*, 1 *Atk.* 474." (74)

(74) According to the above case of *Oliver* & *Taylor*, a recovery may be suffered in the court of Common Pleas of cus-

It must however be recollected, that the statute of 4th Henry 7, is said to extend to copyholds, only when levied by a disseisor, or by a feoffee of a copyholder (75); and for which reason a fine or plaint in nature thereof in a customary court, will not bar an estate tail, except by special custom (76): and yet it has been said, that the interest of a copyholder might be concluded by a fine levied in the lord's court (77).

After an attentive consideration of the question so very properly raised by Mr. Preston, on the effect of a fine of copyhold lands, when levied in the court of Common Pleas, I feel it incumbent upon me to state my opinion, that neither the legal, nor the equitable interest in copyhold lands, could be bound by a fine so levied, but that in either case it would be *coram non judice.* The contrary opinion does not appear to me to receive

tomary freeholds, passing by surrender in a Borough Court, but not of copyhold lands. Yet see *Pullen* & *Middleton,* ubi sup. where a recovery was suffered in the Court of Common Pleas, of the trust of copyholds.

(75) *Post,* title, Statutes: and see *Taylor* v. *Shaw,* Carter, 6, 22.

(76) Cruise on Fines, 175, 193, 213; but see 4 Inst. 270. [" Surrenders or Plaints in nature of fines and recoveries may bar estates tail as well in the Court Baron as at the common law, if the custom have been such, which is the rule in these cases. 3 Feb. 1602. 45 Eliz." Cary's Rep. 30.

(77) See N. 1. to Harg. and Butl. Co. Litt. 121. a. *Hunt* v. *Bourne,* Comy. 93, 124. S. C. 1 Salk. 340. 1 Lutw. 301. *Vide* also 2 Inst. 513. 2 Watk. on Cop. 39 to 42.; but see Cruise on Fines, 211.

the least support from the argument, that the *freehold* interest of the lord, or his grantee, in the *copyhold* lands, is impleadable at common law; and the opinion I have formed, that there is no distinction in this respect between the legal and the equitable interest, in copyhold cases, is in no slight degree sanctioned by the clear principle, that a fine could not have been levied of a use at common law (78), and that it is only since the statute of uses, that the judges have allowed a fine of the equitable interest, in freehold cases, to have the same force as a fine of the legal estate (79); and if a fine in the court of Common Pleas by a copyholder seised of the legal estate, would be void, on account of his disability either to implead or be impleaded in that Court, in respect of his copyhold lands, so I apprehend a fine levied there by a *cestui que trust* of copyholds, would be alike inoperative.

(78) Bro. Abr. tit. fine of land, pl. 4. cites 27 H. 8. 20.

(79) 1 Ch. Ca. 49, 213, 268. Ca. Temp. Talb. 41. 1 Cruise, 210, 211.; and see 2 P. W. 147. 3 Atk. 729.

As far as the observations of Lord Hardwicke in *Pullen* & *Middleton*, may be thought favourable to the power of levying a fine, or suffering a recovery in the Court of Common Pleas of the trust of copyholds, it is to be recollected, that the wife, in that case, was seised of a fee simple conditional, and that a bill had been filed in equity against the trustees to compel a conveyance of the legal estate, and a decree obtained for that purpose; and that it is probable, (although the fact is not noticed by the reporter), that the husband and wife were not permitted to make a surrender of the equitable estate in the Manor Court. Vide *Otway* & *Hudson*, ubi sup.

OF CUSTOMARY DOWER OR FREEBENCH.

As the wife is not dowable, except by custom, the quantity and duration of her interest, are of course regulated by the prevailing custom of each particular manor, where freebench is allowed: it is generally a third for her life, as at common law, but sometimes a moiety, or even the whole (80); in other instances, it is a fourth part only, or only a portion of the rent (81); frequently the customary right is *durante viduitate*; and in some manors it is confined to her *chaste* viduity (82); in manors governed by the tenure of gavelkind, as at Canonbury and in other manors in Middlesex, the wife takes a moiety for her widow-

(80) 1 Inst. 33. b.; and, in the manor of Taunton Deane, in Somersetshire, for an estate in fee. Noy, 2. 1 Lev. 172. 1 Keb. 926. 2 Watk. on Cop. 87.

(81) See 2 Col. Jurid. 382.

(82) Rob. Gav. b. 2. c. 2. 2 Watk. on Cop. 89. *Doe* v. *Askew*, 10 East, 520. In which case it was held, that it was not necessary to shew instances of forfeiture for incontinence in support of the custom, and that the frequent use of the simple term *viduity*, might be explained by other entries to mean *chaste* viduity.

In the manors of East and West Emborne, and the manor of Chadleworth, in Berkshire, the widow, if found guilty of *incontinency*, loses her freebench, unless she comes into court, riding backwards upon a black ram, repeating certain words: the same custom prevails in the manor of Torre, in Devonshire. See 1 Cru. Dig. 327, cites Blount Fragm. Vide also 2 Watk. on Cop. p. 89.

hood: and by the custom of many manors, the widow of a copyholder for lives is intitled to freebench (83).

The wife has not an incipient title to freebench by the marriage, as in dower at common law, or at most it is a conditional inception, for she is intitled to freebench only in the event of the husband's *dying* seised (84). Though by the custom of some manors, the right attaches to all the copyholds of which the husband is seised during coverture.

If, therefore, the husband surrenders and dies, the subsequent admittance of the surrenderee, having relation to the time of the surrender, will defeat the widow's customary estate (85).

(83) Co. Litt. 33 b. Noy, 2. *Chantrell* v. *Randall*, 1 Lev. 20. *Newton* v. *Shafto*, ante, p. 36. Rob. Gav. b. 2. c. 2. *Chapman* v. *Sharpe*, 2 Show. 184. 2 Com. Dig. Copyhold, (K. 2.) Kitch. 201-3. And see 3 Leo. 227, where it was said, that a custom, that a wife should not have her dower, unless she claimed it within a year and a day, was good.

(84) *Benson* v. *Scott*, 4 Mod. 251. 12 Mod. 49. S. C. 3 Levin, 385. S. C. 1 Salk. 185. S. C. Holt, 160. S. C. Skin. 406. S. C. Carth. 275. S. C. Cumb. 234. *Walter* & *Bartlett*, 2 Rol. Rep. 179. *Howard* v. *Bartlet*, Hob. 181. *Waldoe* v. *Bertlet*. Cro. Jac. 573. Palm. 111. 1 Freeman, 516. *Godwin* v. *Winsmore*, 2 Atk. 526.; and see *The King* v. *the Inhabitants of Lopen*, 2 T. R. 577, in which a pauper in possession under a bond given before marriage by the wife, (dowable by the custom if the husband died seised,) was held to gain a settlement.

(85) *Benson* v. *Scott*, sup. *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2785-6-7.

And so will the admittance of the husband's devisees in trust, if he surrenders to the use of his will, but not otherwise (86).

It is also defeated by the admittance of a bargainee of commissioners of bankrupt, which has relation to the inrolment of the bargain and sale, nor will the admittance of the wife before the bargainee make any difference (87).

And it will be defeated by the admittance of a mortgagee after the death of the husband (88).

And even by an agreement for sale for a valuable consideration, and there is no distinction in this respect between copyholds of inheritance, or for lives only where the widow is dowable by the custom of the manor (89).

Freebench is also destroyed by the forfeiture of the husband (90), but not as against the heir of the lord, in cases of forfeiture at *the election* of the lord, should the ancestor not have entered, or if he should have purged the forfeiture by accepting a surrender or otherwise (91).

(86) *Forder* v. *Wade* & others, 4 Bro. Rep. 520. *Hill* v. *Hill*, Co. Ent. 123. a. 125. a.

(87) *Parker* v. *Bleeke*, Cro. Car. 568. S. C. W. Jo. 451.; and see 2 Vern. 194-5., in *Moyses* v. *Little*.

(88) *Benson* v. *Scott*, ubi sup.

(89) *Hinton* v. *Hinton*, 2 Ves. 631-8. S C. Amb. 277. *Brown* v. *Raindle*, 3 Ves. Jun. 256; but see *Musgrave* v. *Dashwood*, 2 Vern. 45, 63, which case, however, is not considered an authority against the rule. See *Hinton* & *Hinton*, sup.

(90) *Allen* v. *Brach*, Winch. 27. S. C. *(Allen* v. *Booth)*, Lex Man. 107.

(91) 1 Freem. 517.

And it is subject to a lease with license (92), though, by special custom, a wife may have dower subject to the lease, and take the benefit of it (93).

And freebench is destroyed by unity of the freehold, but if a copyholder purchase the freehold in the name of a trustee, or, if the lord enfeoff a stranger, and such feoffee conveys to one for life, with remainder to the copyholder in fee, who grants away the remainder, the copyhold continues, and the widow will consequently be intitled to freebench (94).

If the lands escheat for want of a customary heir, still the wife shall have her freebench against the lord or his grantee, the law vesting the estate in her upon the death of the husband (95).

As there can be no proper disseisin of a copyhold, the entry of the disseisor will not prejudice the wife's title to dower (96).

And as any act of the husband for a valuable consideration defeats the wife's dower equally

(92) *Salisbury* d. *Cooke* v. *Hurd*, Cowp. 481. 1 Freem. 516. *Fareley's case*, Cro. Jac. 36. S. C. (*Holder* v. *Farley*), Mo. 758.

(93) *Hill* v. *Hill*, ante.

(94) *Dugworth* v. *Radford*, W. Jones, 462. *Lashmer* v. *Avery*, Cro. Jac. 126. *Walter* & *Bartlett*, or *Howard* & *Bartlet*, or *Waldoe* & *Bertlet*, ante, p. 87. And see Jenk. 318. pl. 15.

(95) 2 vol. Watk. on Cop. 85. cites *Chantrell* v. *Randall*, ante. *Newton* & *Shafto*, ubi supra. *Clarke* v. *Candle*, 2 Siderf. 165. and *Howard* v. *Bartlet*, *Waldoe* v. *Bartlet*, sup. *Jurden* v. *Stone*, Hut. 18.

(96) 2 vol. Watk. on Cop. 77. Post, tit. 'Customary Plaints (*Disseisin*).'

with a legal surrender (97), so, under an agreement to surrender a copyhold estate as an additional security, the wife is compellable in equity to surrender pursuant to the contract (98).

But the dying seised is not essential to dower in gavelkind lands (99).

A wife is not dowable of a trust either of copyholds or customary freeholds (100), though this was formerly doubted (101).

Nor is the wife of a trustee intitled to dower, any more than at common law (102), and though *Burgess* v. *Wheate* (103) is an authority in favour of the widow of the trustee, where the *cestui que trust* dies without an heir, yet, I apprehend, she would be considered a trustee in equity for the lord, or for the personal representatives of the *cestui que trust*, if they had any claim against the lord under any constructive notice of a trust; and as the title of the heir is incomplete as against

(97) Ante, p. 88.

(98) *Brown* v. *Raindle*, 3 Ves. Jun. 256.

(99) See note 164. Watk. Gilb. Ten. Watk. on Desc. 54 (n).

(100) *Forder* v. *Wade* and others, 4 Bro. Ch. Rep. 521. *Godwin* v. *Winsmore*, 2 Atk. 526. *Attorney-General* v. *Scott*, Cas. Eq. temp. Talb. 138. *Vernon's* case, 4 Co. 1 b. *Dixon* v. *Saville* and others, 1 Bro. Ch. Rep. 326. *Curtis* v. *Curtis*, 2 ib. 629. *Chaplin* v. *Chaplin*, 3 P.W. 229.

(101) *Otway* & *Hudson*, 2 Vern. 585. *Banks* v. *Sutton*, 2 P.W. 700. And see *Newbery* v. *Wighorn*, cited 2 Vern. 45. in *Musgrave* & *Dashwood*; and *Forder* & *Wade*, sup.

(102) *Bevant* v. *Pope*, 2 Freem. 71. Vide also *Noel* v. *Jepon*, ib. 43.

(103) 1 Sir W. Bl. 123.

the lord, without admittance, so, I conceive, would be that of the widow in such a case, if the dower were only of a portion of the estate; and it is to be recollected, that upon the death of a *cestui que trust* without heirs, the heir of the trustee has no equity to compel the lord to admit him (104).

As the admittance of a surrenderee defeats the estate of the widow of the surrenderor, so the widow of a purchaser, who dies before admittance or presentment of the surrender, is dowable, the law casting the freebench on the widow, just as it casts the descent on the heir; and the admittance, by relation, makes the husband seised from the date of the surrender (105).

Though the heir dies before admittance, yet will his wife be dowable (106).

And a wife is intitled to dower, though she be divorced *a mensa et thoro* (107).

A jointure before marriage, in lieu of dower and thirds, out of any lands of freehold or *inheritance*, is a bar in equity of freebench (108).

(104) *Williams* v. *Lord Lonsdale*, 3 Ves. Jun. 752.

(105) *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2785.

(106) Fisher, 44. Watk. on Desc. 53-4. Gilb. Ten. 288. And if the widow of the ancestor is endowed, the wife of the heir is to be endowed of the residue of the estate. *Baker* v. *Berisford*, Sir T. Raym. 58.

(107) *Howard* v. *Bartlet*, ante. Fisher, 44.

(108) *Walker* v. *Walker*, 1 Ves. 54. And in *Jordan* v. *Savage*, 2 Eq. Ca. Abr. 101. pl. 8. the wife was held to be barred of her customary estate, though she was an infant at the date of the articles, and was not made a party to them.

And a devise in full of all *dower* or *thirds*, has also been held in equity to be a satisfaction of freebench, which is a customary right *nomine dotis* (109).

But as there is no dower of the trust of a copyhold, the widow of a purchaser who neglects to take a surrender, or where the surrender is void for want of presentment, would not be intitled to freebench.

When a wife is dowable by custom, she has all the incidental qualities of dower at common law (110), and may recover damages by the statute of Merton (111); yet it has been said that the remedy for such damages is in the court of the manor, or in Chancery only, and that no action will lie for them at common law (112).

It has been held, that a woman may sit upon

(109) *Warde* v. *Warde*, Amb. 299.

(110) Where the custom was that the widow should have freebench, *durante viduitate*, and she sowed the land and married before the corn was ripe, it was adjudged that the lord should have the crop, as she had determined her estate by her own act, but that if her lessee had sown the land, then he would have been intitled to the crop. *Oland* v. *Burdwick*, Cro. Eliz. 460. b. S. C. 5 Co. 116. S. C. Mo. 394. pl. 512. S. C. Gouldsb. 189. pl. 136. 2 Inst. 80-1.

(111) Post, tit. 'Statutes.'

(112) Co. Cop. s. 51. Tr. 119. *Shaw* v. *Thompson*, 4 Co. 30. b. S. C. 1 Roll. Abr. 600; but in the report of S. C. Mo. 411, it is said that at another day three justices held the action maintainable, because the court baron cannot hold plea, nor award execution of £40 damages, and yet the damages were well assessed there. And see S. C. Cro. Eliz. 426.

the homage, either in a customary or common law court baron, but not to try issues, it should seem (113).

I shall hereafter shew more particularly, that the wife's estate is a continuation of the husband's, and that she therefore holds of the lord (114), but it would appear that the rule does not extend to gavelkind lands, nor to those instances where she takes only a portion of the land, for there her entry is necessary.

Where the husband's dying seised is not essential to the wife's right to dower, as in gavelkind lands, and she has a provision by way of jointure, charged upon other land, which is relied upon as a protection against freebench, care should be taken on the part of a purchaser, to ascertain, that there is a good title to the lands so charged; this is more particularly essential in copyhold cases, as lands of that tenure, are not within the statute of uses and jointures (115).

Some observations on the practice of joining the wife in a surrender of copyholds, will be found under the head of Copyhold Assurances, and the reader is also referred to Chap. IV. title, Doctrine of Election.

(113) 2 Inst. 119. N. 10. and N. 168. to Watk. Gilb. Ten. p. 357, 475. Post, tit. 'Suit of Court.'

(114) See title 'Admittance.' And vide *Chapman* v. *Sharpe*, 2 Show. 184.

(115) See *Vernon's* case, 4 Co. 1. b. post, tit. 'Statutes.'

OF CURTESY (116).

WE have already seen that curtesy is only a collateral quality in copyholds, and cannot exist but by custom, therefore, as in the case of free-bench (117), the custom of each particular manor must be resorted to, to ascertain the quantity and extent of the interest of the husband in the lands of a feme copyholder (118): it is generally an estate for the life of the husband if there is issue, as at common law, but in gavelkind lands a moiety only, so long as he continues unmarried, and even though there is not any issue.

It is said, that if the custom is for a man taking a copyholder to wife, and having issue, and outliving her, to be intitled to curtesy, he has no right, unless the wife is seised of the estate at the time of the marriage (119): this authority has been doubted (120), but, as it appears to me, without any cause; for, if the wife's

(116) Formerly the estate of the husband in his wife's lands was termed his dower, equally with the estate of the widow in the lands of her husband. Rob. Gav. b. 2. c. 1. p. 136. See also Index to Fitzh. Abr. 2 Watk. on Cop. 68.

(117) Ante, p. 86.

(118) *Ever* v. *Aston*, Moore, 271-2. S.C. (*Ewer* v. *Astwicke*,) 1 And. 192. Rob. Gav. b. 2. c. 1.

(119) *Sir J. Savage's* case, 2 Leo. 109. S.C. cited in *Beale* & *Langley*, ib. 208. Gilb. Ten. 326. Fisher, 43.

(120) See *Clements* v. *Scudamore*, ante, p. 33.

right accrued after the marriage, how could it be said that the husband married a copyholder?: And it is to be recollected, that all customs of such a nature are to be construed strictly.

Influenced by that rule, I apprehend, that where the custom of the manor allows of curtesy, only on the wife's dying seised, the dying seised is essential, in analogy to the case of dower; but a special custom of that nature would not operate unfavourably to the husband, as it is equally out of the wife's power to make any disposition of her copyhold as of her freehold property, without the concurrence of her husband (121).

Mr. Watkins seems to have thought, that where the custom does not expressly require, that there should be issue, the having issue is not essential to give the husband a title (122); but I should apprehend, that, when curtesy is allowed, if the custom is silent with respect to there being issue, the rule of the common law would prevail.

But, where curtesy is allowed by the custom of the manor, there is the same distinction between curtesy and freebench, in favour of the husband, as between curtesy and dower at common law; therefore, even of a trust of copy-

(121) A custom for her to do so would be bad, ante, p. 29.

(122) 2 vol. on Cop. 93. And see 1 vol. ib. 273-4, cites Rob. Gav. b. 1. c. 1. p. 136, 150.

holds, the husband may be tenant by the curtesy (123).

Though the law, as to freehold lands, vests the estate by curtesy in the husband, without assignment, and even without entry, if the wife is already in possession, and prevents the heir from entering and acquiring seisin (124), yet, I apprehend, if the husband takes only a portion of the wife's copyhold land, so that his interest cannot be considered as a continuation of her estate, an assignment and entry are equally as necessary as in the case of freebench (125).

Where the title of the wife is complete against all persons but the lord in respect of his fine, as where she takes by descent, the non-admittance of the wife will not affect the husband's right to the customary curtesy (126): and it is observable, that in *Doe* & *Brightwen*, the only evidence on the rolls, of the husband's right to curtesy, was three instances of the admission of husbands, whose wives had been previously admitted.

(123) 2 Bl.Com. 337. *Sweetapple* v. *Bindon*, 2 Vern. 536. *Cunningham* v. *Moody*, 1 Ves. 176. 2 Watk. on Cop. 80, 95.

(124) Watk. on Desc. 103.

(125) Post, tit. 'Admittance. (Baron and Feme.)'

(126) *Doe* d. *Milner* v. *Brightwen*, 10 East, 583.; and see *Ever* & *Aston*, or *Ewer* & *Astwicke*, ante, (n. 118). 6 Vin. Cop. (H. e.) pl. 2. Calth. Read. 69.

OF PARTICULAR STATUTES
affecting, and not affecting, Copyholds.

BEFORE we quit the subject of the peculiar properties of copyhold tenure, contrasted with the incidental qualities of frank or freehold tenure, it appears to me desirable to consider of the applicability of particular statutes to copyhold lands, when not expressly named in them: and in which we are essentially aided by the following exposition of Lord Coke: viz. that when an act of parliament altereth the service, tenure or interest of the land, or other thing in prejudice of the lord or tenants of the manor, there the general words of such act, extend not to copyholds (127): but, when an act is generally made for the good of the commonwealth, and no prejudice may accrue by reason of the alteration of any interest, service, tenure, or custom of the manor, there, usually, copyholds are within the general purview of such acts (128).

(127) It was on this principle that copyholds were held not to be within the act 12 Car. 2. of Regicides. See *Duke of York* v. *Marsham*, Hard. 432. *Lord Cornwallis's* case, 2 Vent. 38. et vide 1 Show. 287. Carth. 205.

(128) Co. Cop. s. 53. Tr. 122. *Heydon's* case, 3 Co. 8, 9. Moore, 128. Sav. 66-7. *Rowden* v. *Malster*, Cro. Car. 42. *Glover* v. *Cope*, Carth. 205. S. C. 3 Lev. 327. S. C. 4 Mod. 83, 84-5. S. C. Holt, 159. S. C. Skin. 296, 305. S. C. 1 Salk. 185. *Doe* d. *Watson* v. *Routledge*, Cowp. 710. 1 Bac. Ab. 711.

Conformable to this rule, copyholds are held,

To be within

The statute of Merton, 20 Hen. 3. c. 1. giving damages on a recovery in a writ of dower (129).

The 3d and 4th chapters of West. 2. 13 Ed. 1. giving a *cui in vita* upon a discontinuance by the baron, a *receit* upon the baron's refusal to defend the wife's title, and a *quod ei deforceat* to particular tenants: and also the 32 Hen. 8. c. 28. giving an entry in lieu of a *cui in vita* (130).

The 4th Hen. 7. c. 24. making fines a bar on five years non-claim, but this is only where a fine is levied by a disseisor, or by the feoffee of a copyholder, as a fine by a copyholder is void (131).

(129) *Shaw* & *Thompson*, 4 Co. 30. b. S. C. Cro. Eliz. 426. S. C. Mo. 410. 1 Roll. Abr. 600. Co. Cop. s. 55. Tr. 126.; and see 1 Inst. s. 36. 2 Inst. 80. Cro. Car. 43. in *Rowden* & *Malster*. *Ante*, title Freebench.

(130) *Heydon's* case, ante p. 97. Co. Cop. s. 55. Tr. 126. *Rowden* & *Malster*, sup. *Roswell's* case, Dy. 264. a. Sav. 67. Gilb. Ten. 109. 2 vol. Watk. on Cop. 36. 189, 190. *Sed quære*, as to the 32 H. 8. c. 28. and see reference (156) of this chap. and Kitch. 173.

(131) *Fermor's* case. 3 Co. 77. a. *Saffyn's* case, 5 Co. 123. b. *Margt. Podger's* case, 9 Co. 105. a. Co. Cop. s. 55. Tr. 126. *Howlet* v. *Carpenter*, 3 Keb. 775. S. C. 1 Vent. 311. *Saliard* & *Everat's* case, 1 Leo. 99. *Archbold* v. *Cook*, Noy, 23. cites *Mills* v. *Bradley*, T. 2 Jac.

The 32 Hen. 8. c. 2. 21 Jac. 1. c. 16. of limitations of actions, &c. (132).

Ib. c. 9. against maintenance, champerty and buying of titles (133).

Ib. c. 34. giving grantees of reversions a right of entry, and of action, against lessees (134).

C. B. 2 Inst. 516. *Freeman* v. *Barnes*, 1 Sid. 458. Preston on Conv. 1 Vol. 260, 301. 2 Sanders on Uses and Trasts, 17. Shep. Touchst. 21-2. 6 Vin. Cop. (O.d.) pl. 13, 14. *Doe d. Tarrant et al.* v. *Hellier et al.* 3 T. R. 173. post, tit. 'Forfeiture.'

(132) 6 Ed. 6. Bro. Limitations, pl. 2. Kitch. 167. *Lyford* v. *Coward*, 2 Ch. Ca. 151. S. C. 1 Vern. 195. *Knight & Adamson*, 2 Freem. 106. Com. Dig. tempe. (G. 1.) *Glover & Cope*, ante p. 97. (but see more particularly the report in 3 Lev. and 4 Mod.) *Shaw & Thompson*, Mo. 417. *Heydon's* case, Ib. 128. 2 Watk. on Cop. 37. Post, tit. 'Ejectment' and 'Customary Plaints.' But the 4 s. of 32 H. 8. c. 2. as to Avowry for rent, suit, or service, does not extend to casual services, as Homage, Fealty, and Heriot; nor does it extend to Reliefs; *Bevil's* case, 4 Co. 10. b. 11. a. 2 Inst. 96.

(133) Co. Litt. 369. b. *Kite & Queinton's* case, 4 Co. 26. a. Co. Cop. s. 55. Tr. 126. *Glover & Cope*, sup.; (but see more particularly the report in 3 Lev. and 4 Mod.) *Rowden & Malster*, Cro. Car. 48.

(134) *Glover* v. *Cope*, sup. *Baker* v. *Berisford*, 1 Keb. 357. *Webb* v. *Russell*, 3 T. R. 398, 401: but this was formerly doubted, *vide* Co. Cop. s. 54. Tr. 125. *Platt* v. *Plommer*, Cro. Car. 24. *Beal* v. *Brasier*, Cro. Jac. 305. S. C. (*Brasier* v. *Beale*.) Yelv. 222. S. C. 1 Brownl. & Goldsb. 149. *Swinnerton* v. *Miller*, Hob. 177-8. Lex Cust. 253.; and it is to be observed, that even before the stat. of 4 Ann. c. 16. it was held, that an attornment to the surrenderee of a reversion of copyholds was unnecessary,

The 27 Eliz. c. 4. of fraudulent conveyances (135).

The 1 Jac. c. 15. 21 Jac. c. 19. of bankrupts, and this by construction, copyholds being expressly mentioned in 13 Eliz. c. 7. (136).

The 12 Car. 2. c. 24. s. 8. enabling the father to appoint a guardian to his children, if the custom does not give the wardship to the lord; *contra*, if it does: this, at least, is the distinction made by Mr. Watkins, and, as I submit, upon very just principles (137).

the surrender and admittance being in the nature of an attornment, or at least supplying the want of it, *vide Black* v. *Mole*, Sir T. Raym. 18. S. C. 1 Lev. 40. S. C. 1 Keb. 93. *Swinnerton* v. *Miller*, sup. 1 Leo. 297. ca. 408. 3 Leo. 197. ca. 247. 4 Leo. 230. ca. 352.

(135) *Glover* & *Cope*, ante (but see particularly the report in 3 Lev.) *Doe* d. *Watson* v. *Routledge*, Cowp. 709. S. C. cited in Dougl. 716, (n. 1.) and in Roberts' Fraud. Conv. 447.; and see 2 Watk. on Cop. 191. *Sed quære*, and see Bull, N. P. 108. Rob. Fraud Conv. 447. n. (b). Atherl. Marr. Sett. 206.

(136) *Crisp* v. *Pratt*, Cro. Car. 550. S. C. Mar. 34. S. C. W. Jones, 437. 1 Roll. Abr. 523. pl. 5. Gilb. Ten. 182. 6 Vin. Cop. (O. d.) pl. 35-6. *Parker* & *Bleeke*, Cro. Car. 568. S. C. W. Jones, 451.

It is to be recollected, that no time is limited by the act of 13 Eliz. c. 7. for the inrolment of the bargain and sale of the commissioners, but that the act of 21 Jac. c. 19. authorising the commissioners to convey the intailed estates of a bankrupt, requires that the bargain and sale should be inrolled within six lunar months. See extracts from these statutes in the Appendix.

(137) 2 Watk. on Cop. 104, 195. Hutt. 17. But see 3 Salk. 177. *Clench* v. *Cudmore*, Lutw. 1190. S. C. 3 Lev. 395, and

The 7 Anne, c. 19. authorising infant trustees to convey (138).

The 4 Geo. 2. c. 10. authorising trustees being ideot, lunatic, or non compos mentis, or their committees, to convey (139).

The 4th Geo. 2. c. 28. s. 5. of distress for rent arrear (140).

see 1 Lord Raym. 132-3, in *Wade* v. *Baker* & *Cole*. *Egleton's* case, 2 Roll. Abr. 40. Garde, P. *The King* v. *the Inhabitants of Wilby*, 2 Mau. & Sel. 508. Vide also Co. Cop. s. 23. Tr. 20.

(138) *Doe* & *Morgan*, 7 T.R. 104. and see *Nayler* & *Strode*, 2 Ch. Rep. 392. See also *ex parte Anderson*, 5 Ves. Jun. 240. in which an infant trustee was ordered to convey an estate in Calcutta; and several cases cited, ib. 242, where the Court had ordered infants to convey estates in the Colonies, the act being general. And, as the lord would receive a fine on the change of tenantcy, there is much weight in the argument, that copyholds are within this act. But I apprehend that an infant heir or devisee, where a copyhold estate is decreed to be sold for payment of debts, is not a trustee within the above statute, which only extends to those cases where the infant is a dry trustee, and not to cases where there is a trust to be executed. See *Blatch* & *Agnis* v. *Wilder and others*, 1 Atk. 420. Vide also Dickens, Ch. Ca. 400 in *Riggs* v. *Sykes*; Ib. 392 in *Chandler* v. *Beard*. 2 Cox. Ch. Ca. 221 in *Attorney General* v. *Pomfret*, Ib. 422. 17 Ves. 383. Yet see *ex parte Knight, Lady Teynham* v. *Head*, 1799, Chan. cited by Mr. Sugden, 5th Ed. Vend. & Purch. 175, n.

In *ex parte Johnson*, 3 Atk. 559. Lord Hardwicke made an order, that an infant trustee, tenant in tail, should convey by a common recovery. And in *ex parte Maire*, Ib. 479, a feme covert, the infant heir of a mortgagee, was directed to convey by fine. And see Anon. Comy. 615.

(139) 1 Watk. on Cop. 63.

(140) 2 Watk. on Cop. 181-2, 191.; and see n. 150. to Watk. Gilb. Ten. p. 468. Fisher, 138.

The 9 Geo. 2. c. 36. commonly (though improperly) called the statute of mortmain (141).

The 11 Geo. 2. c. 19. s. 15. authorising the executors of a tenant for life to recover a proportion of the rent from an under tenant, whose estate determines on the death of such tenant for life (142).

The 8th sec. of 17 G. 3. c. 26. (for registering the grants of life annuities,) mentioning certain cases to which the act should not extend (143).

Not to be within

The 20 Hen. 3. c. 10. of *Merton*, authorising suit by attorney (144).

(141) *Attorney General* v. *Lord Weymouth*, Amb. 20. *Arnold* v. *Chapman*, 1 Ves. 108. *Attorney General* v. *Andrews*, ib. 225. *Doe* d. *Howson* v. *Waterton*, 3 Barn. & Ald. 149. 2 Watk. on Cop. 192. Post, tit. 'Surrender.'

(142) A tenant in tail who dies without issue, being in law considered as a tenant for life only, or at least as having only *an estate for life*, (and the preamble of the act speaks of persons having *estates for life*), is within this statute. *Paget* v. *Gee*, Amb. 198. S. C. 9 Mod. 482. [5th Ed.] S. C. 1 Burn, J. 633. So also is a rector, 8 Ves. 308.

(143) See 53 G. 3. c. 141. which repeals the act of 17 G. 3. but so as not to affect annuities previously granted: the 10th sect. of 53 G. 3. (by which certain cases are excepted out of the provisions of the act,) expressly mentions copyholds.

(144) *Sir John Braunche's* case, 1 Leo. 104. 2 Inst. 100. 2 vol. Watk. on Cop. 106, 189, 192.

Nor the 52 Hen. 3. c. 9. of *Marlborough*, giving contribution for suit (145.)

Nor 6 Ed. 1. c. 12. of *Gloucester*, as to foreign warranty (146).

Nor the Stat. of *Acton Burnel, de Mercatoribus.* 11 Ed. 1. (147).

Nor the 13 Ed. 1. c. 1. West. 2. *de donis* (148).

Nor the 13 Ed. 1. c. 18. of *elegit* (149).

Nor the 17 Ed. 2. c. 9. wardship of ideots (150).

Nor the 16 R. 2. c. 5. as to the Pope's bulls (151).

Nor the 11 Hen. 7. c. 20. alienation by wife of estate in dower, &c. (152).

(145) See 2 Inst. 117. F.N.B. 162. 2 Watk. on Cop. 179, 192.

(146) 2 Inst. 324.

(147) *Heydon's* case, Mo. 128. Sav. 67.

(148) Ante, tit. 'Estates Tail.'

(149) *Heydon's* case, sup. Co. Cop. s. 53. Tr. 123. Cro. Car. 44. ante, p. 60.

(150) Co. Cop. s. 55. Tr. 125. Supp. s. 21. Gilb. Ten. 186, 223.; and see *Beverley's* case, 4 Co. 126. *Tourson's* case, 8 Co. 170. ante, p. 62.

151. Co. Cop. s. 53. Tr. 123. Gilb. Ten. 186. 2 Watk. on Cop. 193. 5 East, 524.

(152) *Glover* & *Cope*, ante p. 97.; (and see particularly the report in 4 Mod.) *Harrington* v. *Smith*, 2 Sid. 41, 73. But where the freehold had been conveyed to the husband and wife, joint copyholders in fee,

Nor 29 Eliz. c. 6. of recusancy (161).

Nor 31 Eliz. c. 7. of cottages (162).

Nor 21 Jac. c. 16. of limitations, so as to bar an action for a fine (163).

Nor 12 Car. 2. c. 24. s. 8. authorising a father to appoint a guardian to his children (164).

Nor the 29 Car. 2. c. 3. s. 12. 14 Geo. 2. c. 20. s. 9. of occupancy (165).

(161) *Salherd* v. *Evered*, Owen, 37; but see S. C. (called *Saliard* v. *Everat*,) 1 Leo. 97. where it is reported differently, and as if the Judges were of opinion that copyholds were within the equity of the stat.

N. B. By 35 Eliz. c. 2. s. 5. it was expressly provided, that if any person having lands of copyhold or customary tenure, and being convicted of recusancy, repaired not home to his or her usual place of abode, not removing from thence above five miles distant, then the person so offending should forfeit such copyhold or customary land, for the life of the offender, (if his or her estate so long continued,) to the lord of whom it was holden, unless such lord was a recusant convict, or seised or possessed in trust for such recusant copyhold or customary tenant, and in that case the forfeiture to be to the Queen.

(162) *Brock* v. *Bear*, 1 Bulst. 50.; and see *Smith's* case, W. Jones, 272. [N. B. This act was passed to prevent lords of great wastes from converting the whole to building purposes, to the prejudice of agriculture.]

(163) Gilb. Ten. 178. *Hodgson* v. *Harris*, 1 Lev. 273. S. C. 2 Keb. 536. 2 vol. Watk. on Cop. 195. 1 vol. ib. 321. 5 East, 524.

(164) Gilb. Ten. (n. 172.) p. 476-7. *Sed vide* the authorities in n. 137, of this chapter.

(165) *Smartle* v. *Penhallow*, *Zouche* d. *Forse* v. *Forse*, ante, p. 61-2.; and see Amb. 162 in *Withers* v. *Withers*.

CHAP. III.

Of the Qualifications of the Lord of the Manor, his Grants, &c.

THE law does not regard either the quality of his person, or the quantity of his estate; for although he is not *sui juris*, or is seised of a limited interest only, yet may he make a voluntary grant in fee, or for such estate as is authorised by the custom of the manor, which grant would be good, although the interest granted should continue longer than that of the lord; for instance, the infancy, ideotcy, or lunacy of the lord of the manor,—or his being an outlaw (1), an excommunicate, a feoffee on condition, guardian in socage, tenant in tail, for life, or for years, or even at will, tenant by the curtesy, by statute, or by elegit (2); or his being a bishop or other

(1) Even if the outlawry is for felony or murder, and the grant be made between the awarding of the exigent, and the period of attainder, Co. Cop. s. 34. Tr. 71.

(2) Co. Litt. 58. b. Co. Cop. s. 34. *Reeve* v. *Martin* & *Cooper*, Noy, 41. *Delavel* v. *Clare*, ib. 85. *Shoplayne* v. *Roydler*, Cro. Jac. 55, 98. S. C. Owen, 115. S. C. Godb. 143. S. C. 4 Leo. 238. 1 Lord Raym. 131. *Lord Norris's* case, Noy, 106. *Neale* v. *Jackson*, 4 Co. 26-7. S. C. Cro. Eliz. 394. *Clarke* v. *Pennifather*, 4 Co. 23. b. 11 Co. 18. a. Kitch. 166-7. 6 Vin. Cop. (G.) Com. Dig. Cop. (C. 3.) 2 Roll. Abr. 41. pl. 3. 2 P. W. 123.

ecclesiastic seised in right of his bishopric or church (3), will not disable him from making a voluntary grant; and in the latter case the grant would be good even against the king, on the vacancy of the see. So a grant by a dowress (4), or by the husband seised in right of his wife (5), is equally good to bind the inheritance or other estate authorised by the custom; but in the latter instance, the wife's joining is essential (6).

In *Blewit's* case (7) it was held, that the committees of a lunatic could not grant a copyhold,

Gilb. Ten. 189.; but it has been doubted whether a mere tenant at will of a manor could hold a court and grant copyholds. Post, tit. 'What things are demiseable by copy.' And see Br. tenant by copy, pl. 27, 28-9.

[Note. If a feme guardian in socage takes husband, yet the feme continues guardian. *Osborne* v. *Carden* & *Joye*, Plow. Com. 293. b. 4 Vin. Abr. *Baron* & *Feme*, (E.) pl. 4. Ib. (F.) pl. 3. But a guardian in socage has an interest joined with a trust. See 14 Vin. Ab. *Guardian* & *Ward*, (Q.) pl. 10. marg. and yet the husband shall not be guardian after her death. *Willis* v. *Whitewood*, Ow. 45.]

(3) 4 Co. 21. b. in *Brown's* case, cites 4 H. 6. 11. 21 H. 6. 37. Ib. 23. b. in *Clarke* v. *Pennifather*. 1 Watk. on Cop. 26. cites 15 H. 7. pl. 13. fol. 10. a. Gilb. Ten. 197. But see *Long* v. *Baker*, 1 Roll. Rep. 202.

(4) Godb. 135. pl. 156. *Bragg's* case, in which it was held, that the widow suing for her dower, per nomen 100 messuages, &c. had no manor, and could not grant. And see Goldsb. 37. pl. 11.

(5) 4 Co. 23. b. 8 Co. 63. b.

(6) *Shoplane* v. *Roydler*, Cro. Jac. 99. Co. Cop. s. 34. Tr. 68. For the manner of holding a court, and of proceeding for the recovery of heriots, when the husband is seised in right of his wife, vide 1 Vol. Ca. & Op. 216.

(7) Ley, 47-8, and see 6 Vin. Cop. (G) pl. 15.

as they had no estate, but that the lunatic, by his steward, (who was appointed by him by deed, before he became lunatic,) might grant according to the custom of the manor; and although it was in that case ordered, that the steward should not grant without the privity of the committees, and the sanction of the court, yet it would seem that such grants would be good in law.

The above rules apply as well to such estates as are surrendered by the copyholder, through the medium of the lord, as also to any copyholds which may escheat: and though by relation the manor is forfeited from a period prior to the grant, yet the grant will not be impeachable; as if the lord commit treason or felony, and afterwards, and before he is attainted, grants a copyhold estate held of the manor, such grant shall stand good (8).

So also if a manor be granted to A. on condition, and A. before, or even after, the condition broken, but previous to entry for breach of the condition, grants out copyholds, such copies will be good (9).

(8) Co. Cop. s. 34. Tr. 70-1. 1 Watk. on Cop. 27-8.

(9) *Earl of Arundel's* case, Dy. 342. b. S. C. Jenk. Rep. 242. ca. 26. S. C. Bendl. & Dal. 290. S. C. 4 Co. 24. a. Co. Cop. s. 34. Tr. 70, 74-5. but if the manor be leased on condition, for a term of years *only*, it should seem that a grant of copyholds after breach of the condition, would not be good. Co. Cop. s. 34. Tr. 74.

And a grant by the feoffee of an infant, could not be defeated by the subsequent entry of the infant. Co. Cop. s. 34. Tr. 75.

And again, if a man marries a feme seignioress under the age of consent, and afterwards she does disagree, though the marriage be void *ab initio*, yet copyholds granted before disagreement are good (10).

In *Smith* v. *Reynard* (11), it was said, that when copyholds escheat or are forfeited to the lord, he may regrant by copy, rendering a greater rent; but this does not seem to be the law; neither can the lord diminish the ancient rent and services (12).

It has been doubted whether the lord may regrant out copyholds which come to his hands by escheat or forfeiture, or by purchase, in separate parcels, at apportioned rents (13); but I am

(10) Co. Cop. s. 34. Tr. 70, 71.

(11) 2 Rol. Rep. 286; and see Kitch. 167.

(12) *Harris* v. *Jay*, 4 Co. 30. a. S. C. Cro. Eliz. 699, 700. *Clarke* v. *Pennyfather*, 4 Co. 23. b. *Paston* v. *Manne*, Het. 6. and see Gilb. Ten. 198. 2 Bla. Com. 370. ["If the lord fail in reserving *verum et antiquum redditum*, as if he reserveth 10s. where the usual rent customably reserved is 20s., this may be a means to avoid the admittance. And the law is very strict in this point of reservation; for though the ancient accustomable rent be reserved according to the quantity, yet if the quality of the rent be altered, the heir may avoid this grant. For if the ancient rent from time to time hath been 20s. in gold, and the lord reserveth it in silver, this variance of the quality of the rent is in force to destroy the grant: So if the ancient rent hath been accustomably paid at four feasts in the year, and the lord reserveth it at two feasts." Co. Cop. s. 41. Tr. 90, 91.] And see Kitch. 167.

(13) Co. Cop. s. 41. Tr. 91. where he says "So, if two copy-

apprehensive that this disability, can only apply to a lord having a limited interest in the manor, in analogy to cases of reservation of rent in leases by ecclesiastical bodies, and tenants in tail; and even as to a lord *pro tempore*, his regrant at an apportioned rent, would be binding on him, I conceive, and avoidable only, if at all, by the remainder man (14): When the lord is seised in fee, it should seem that he is as capable of apportioning the rent on a re-grant of copyholds, as in the case of freehold lands held by an ancient quit rent, the effect of such apportionment being a release and extinguishment of the residue of the rent, as to the particular lands re-granted (15); and this conclusion is favoured by the rule, that coparceners, because they take by act of law, may regrant copyholds that escheat, at an apportioned rent (16); and by the settled doctrine

holds escheat to the lord, the one of which hath been usually demised for 20s. rent, the other for 10s. rent, and he granteth them both by one copy for one rent of 30s.; this is not good: And so if a copyhold of 3 acres escheats, which hath ever been granted for 3s. rent, and the lord granteth one acre, and reserveth *pro rata* one shilling rent, *verus et antiquus redditus* is not reserved. But if a copyhold of six acres, which hath ever been demised for 6s. rent, escheated to 2 copartners, and one granteth 3 acres, reserving 3s. *pro rata*, this is a perfect reserving." And see *Lord Mountjoy's* case, 5 Co. 3. b. 2 Bla. Com. 370. 1 Watk. on Cop. 282.

(14) Gilb. Ten. 200.

(15) See Kitch. 170. who says that a rent of a copyholder may be apportioned as well as another rent. *Doe* & *Huntington*, 4 East, 271, 289.

(16) Sup. (n. 13.) And see 5 Co. 5. a & b.

that a rent service shall not be extinct by the lord's purchase of part of the tenancy, but shall be apportioned (17).

If lands grantable in fee escheat, the lord may grant them out again by copy for life only, and may regrant them after the death of the copyholder for life; or he may grant the reversion, by copy, to another (18).

It has been said, that a lord who has a limited interest in the manor, cannot grant a copyhold in reversion without a special custom (19); this *dictum* is controverted by Mr. Watkins, who, nevertheless, thinks a custom to restrain a tenant for life or years from so granting, might be good (20), of which, I apprehend, there can be no doubt; but, even when there is no such custom, I agree with Mr. Watkins, that the tenant of a limited interest in a manor, where the copyholds are held in fee, may grant in reversion, and that such grant will be good although it does not fall into possession before the determination of the interest of the grantor; for it is only a grant of a portion of a greater interest,

(17) Co. Litt. s. 222-3.

(18) *Kempe* & *Carter's* case, 1 Leo. 56.

(19) March Rep. 6. pl. 13, and see Gilb. Ten. 204-5. *Lord Oxford's* case, Mo. 95. pl. 236. Co. Cop. s. 34. Tr. 74. *Plimpton* v. *Dobynet*, Gouldsb. 102. pl. 8. 1 Leo. 158. 3 Leo. 226. pl. 303. Godb. 140. 6 Vin. Cop. P. 3. pl. 1. and marg.

(20) 1 vol. on Cop. 40. cites Gilb. Ten. 322. Com. Dig. Cop. (C. 12.) Vide also *Carew's* case, Mo. 147. pl. 292. 6 Vin. Cop. G. pl. 9. & n. Dy. 343.

which the custom authorises to be granted by the lord *pro tempore*, of whatever nature his estate may be (21): but see *Gay* v. *Kay* (22), in which the custom seems to have influenced the court in deciding that a dowress might grant for lives in reversion. In that case it was said, that the tenant of a particular estate cannot grant a copyhold by parcels, or demise part and retain the residue; and, therefore, that if a feme be endowed of several copyhold tenements, she cannot grant part of them by copy in possession or reversion.

It has been said, that if there be two joint tenants of a manor, and a copyhold escheats, one of them may grant the entirety of this copyhold, each being seised *per mie et per tout* (23); yet this power has been doubted (24).

But whatever estate the lord may have in the manor, he must be *legitimus dominus pro tempore*,

(21) Vide *Shoplane* v. *Roydler*, Cro. Jac. 99. 2 Roll. Abr. 41. (Q) pl. 3. 2 P. W. 122, in the case of *Lord C. J. Eyre* v. *The Countess of Shaftsbury*. And in *Davies* v. *Fortescue*, Hetl. 54, it was said, that if a man be seised of a manor whereof there are divers copyholders admittable for life or for years, and he leaseth the manor to another for term of life, the lessor [lessee] may make a demise by copy in reversion to commence after the death of the first copyholders, and that is good enough, but the custom of some manors is to the contrary, and that is allowed.

(22) Cro. Eliz. 661.

(23) Co. Cop. s. 34. Tr. 76. And see 1 Watk. on Cop. 26.

(24) *Lancaster* v. *Lucas*, 1 Leo. 234. and see *Hurleston's* case, cited Dy. 377, marg. pl. 28. 2 Bla. Com. 183.

and be seised in possession, or at least must derive his power from a person who is the lord *pro tempore:* therefore a grant of copyholds, or a feoffment of the manor, to a stranger, by a disseisor or his heir, will not bind the disseisee, but may be avoided by him upon his recovery or entry (25). And grants of copyholds by a tenant in tail after discontinuance, and by the feoffee of a man seised in right of his wife, may, after the death of the grantor, be avoided by the heir recovering in a formedon in the descender, and by the feme upon her entry, or recovery in a *cui in vita* (26). And so, again, is the law upon grants made by the heir after the death of the ancestor, of lands whereof the widow is endowed, which may be avoided by her (27); and also upon grants by copy made by an abator or intruder (28); or by a tenant at sufferance (29), as by a grantee *pur auter vie* continuing after the death of the *cestui que vie,* or by the lessee for years of a tenant for life, who dieth, or by the lessee for years of a manor, after breach of a condition annexed to his estate, and before entry of the

(25) Kitch. 167. Co. Cop. s. 34. Tr. 72-3. Co. Litt. 58. b. *Dillon* v. *Fraine,* Poph. 71.

(26) *Chudleigh's* case, 1 Co. 140. b. *French's* case, 4 Co. 31. Co. Cop. s. 34. Tr. 73-4. Co. Litt. 58. b. Kitch. 167, 173. *Dillon* v. *Fraine,* sup.

(27) N. 6. to Co. Litt. 58. b. Co. Cop. s. 34. Tr. 71.

(28) Co. Litt. 58. b.

(29) *Rous & Artois,* 2 Leo. 45. S. C. Ow. 28. S. C. Mo. 236. S. C. 4 Co. 24. a. Co. Cop. s. 34. Tr. 74.

lessor (30); and also upon grants made after an alienation in mortmain, and before the lord paramount hath entered for a forfeiture; or by a parson (a manor being parcel of his glebe), made after institution and before induction; for, as to the temporalties, he is not compleat parson before induction, though it is otherwise as to the spiritualties (31).

And if the lord of a manor seised in fee simple, by his will directs that his executors shall grant copyhold estates according to the custom of the manor, for the payment of his debts, &c. and they make voluntary grants accordingly, these grants are good, although they have no interest whatever in the manor (32).

But the act of admittance to a copyhold estate pursuant to a surrender, is distinguishable from a voluntary grant, and is in the nature of a judicial act only, as no interest passes to the lord by the surrender; therefore admittances made by disseisors, abators, intruders, tenants at sufferance, or others having defeasible titles, are good (33).

(30) It should seem that the holding of a court, would amount to an entry on a manor for a condition broken. Calth. Read. 49.

(31) Co. Cop. s. 34. Tr. 74-5.

(32) Co. Litt. 58. b. Co. Cop. s. 34. Tr. 72-3.

(33) Kitch. 167. *Chudleigh's* case, 1 Co. 140. b. S. C. (called *Dillon* & *Fraine*) Poph. 71. 4 Co. 24. a. *Moore* & *Pitt*, 1 Vent. 359. *Rous* & *Artois*, Ow. 28. S. C. 2 Leo. 46-7 S. C. Mo. 236-7.

So also as to an admittance by the heir before assignment of dower (34), or by a devisee, whose estate is afterwards avoided (35).

And if the lord, having a particular or defeasible interest in the manor, die after taking the surrender, the lord in remainder shall be compelled to admit the surrenderee (36).

The disregard which the law has to the extent of the lord's estate, being confined to such acts as are done by him *secundum consuetudinem manerii*, and which do not arise out of his interest in the manor, it follows, that if a tenant for life of a manor grants a license to a copyholder to alien or demise, and dies, the license will cease; for it only operates as a waiver of the right of the lord, who cannot grant a dispensation for a longer term in the tenancy, than he has in the seigniory (37): and, *à fortiori*, a contract or agreement for a license, made by a person having a life estate only, or other particular interest in the manor, will not bind the lord in remainder (38).

The lord of a manor is Chancellor in his own court (39); so, where a copyholder surren-

(34) *Rous* & *Artois*, Mo. 237.

(35) *Rous* & *Artois*, Ow. 28. S. C. 2 Leo. 46-7. cites *Stowley's* case.

(36) Co. Litt. 59. b. cites *Earl of Arundel's* case, 17 Eliz.

(37) *Munifas* v. *Baker*, 1 Keb. 25-6. *Petty* v. *Evans*, or *Pettis* & *Debbans*, 2 Brownl. 40. 1 Roll. Abr. 511. (K). 6 Vin. Cop. (I. d.) Gilb. Ten. 203, 299.

(38) See *Awbry* v. *Keen*, 1 Vern. 472.

(39) Kitch. 162. 14 H. 4. 34. *Winter* & *Jeringham*, Dy. 251. b. pl. 92; and see Mo. 69. pl. 185. Co. Cop. s. 44. Tr. 100. 6 Vin. Court, (G) pl. 10.

dered to the use of A. upon trust to levy certain monies, and afterwards to surrender to the use of B., and the monies were levied, and A. refused to surrender; B. had exhibited a bill in the lord's court against A. who was decreed to surrender, which he still refused; and the Court of King's Bench held, that the lord might seise and admit B. (40).

The lord's title by escheat is so far favoured, that where the *cestui que trust* dies without heirs, the heir of the trustee cannot, in equity, compel an admission (41); but the Court of King's Bench will grant a mandamus for his admittance, to enable him to try his title (42).

If a copyhold escheat, or is forfeited, or becomes extinguished by unity with the manor, (for it is not material whether the copyhold comes to the lord, or the manor to the copyholder,) and the lord makes a lease, or a feoffment in fee, (though on condition, and he afterwards enters for the condition broken,) or any other common law assurance; or if the land is actually extended upon a statute or recognizance acknowledged by the lord, or is assigned to his wife in a writ of dower, the custom, (as I have already

(40) 1 Leo. 2. pl. 2.

(41) *Williams* v. *Lord Lonsdale*, 3 Ves. Jun. 752. Ante, p. 91.

(42) *The King* v. *Coggan* and another, 6 East, 431. S. C. 2 Smith's Rep. 417. *The King* v. *Rennett*, 2 T. R. 197. *The King* v. *the Lord of the Manor of Hendon and his Steward*, Ib. 484. 5 East, 58.

shewn (43), is destroyed, and the land cannot afterwards be granted by copy, because during such estate it was not demised or demiseable by copy of court roll; but if he keeps it in hand, or lets it at will, he, or his heirs, or alienee, may regrant at pleasure (44); and the grantee will hold discharged of the dower of the wife of the lord, and of any statute or recognizance executed by him (45).

But a lease by the king of an escheated copyhold, is an exception to the rule, that a common law assurance prevents a regrant (46).

(43) Ante, p. 17, 18. But such customs as run with the land, as the custom of gavelkind, or Borough English, are an exception to the rule, for they remain, even after severance. *Murrel* & *Smith*, 4 Co. 25. a. *Beale* & *Langley*, 2 Leo. 208. Rob. Gav. 70, 71-4. Br. Custom, 19. Br. Extinguishment, 14.

(44) Ante, p. 18.

(45) *Swayne's* case, 8 Co. 63. b. S. C. Mo. 811, 812. 4 Co. 24. a. Co. Cop. s. 34. Tr. 71. *Podger's* case, 9 Co. 107. *Sammer* & *Force*, 2 Brownl. 208. *Cham* & *Dover*, 1 Leo. 16. *Earl of Westmoreland's* case, 3 Leo. 59. *Sands* & *Hempston*, 2 Leo. 109. And see *Sneyd* v. *Sneyd*, 1 Atk. 442. Sed vide *Walton's* case, Dy. 270. b. Mo. 94. pl. 233. 1 Leo. 4. In the above case of *Samner* & *Force*, Coke, C. J. said "that if a copyholder be of 20 acres, and the lord grants rent out of those 20 acres, in the tenure and occupation of the copyholder (and name him), there if this copyhold escheat, and be granted again, the copyholder shall hold it charged, for this is now charged by express words."

(46) Ante, p. 18. And the rule, that an exception of the court baron in a grant of the manor, is void, (ante, p. 13.) does not apply to a grant by the King. *Sir Robert Acton's* case, Dy. 288. b. pl. 54.

And the act of the tenant for life or years of the manor, will not affect the copyhold interest so as to prejudice the person in remainder; therefore, when in such a case the particular tenant creates a common law interest or a charge to affect the land, such interest or charge is not good against the estate of the remainder-man(47).

If the lord grant by copy, to hold for the lives of others and the longest liver of them *successively*, it will not give any estate to the *cestui que vies* without a custom in favour of such a construction(48).

A grant by the lord to the father and son, there being but one son, is good; but if more than one son, it is void for uncertainty(49).

It is sufficient to create an estate, if the person intended to take is named in the *habendum* of a copy, though not in the grant, for in many manors it is customary to insert the words of grant and limitation in the *habendum* only(50).

As the greater estate includes the less, where the custom warrants a grant in fee simple, the lord may grant to one and the heirs of his body, for life, for years or any other estate(51): and

(47) Ante, p. 19. Post, tit. 'Extinguishment.'

(48) *Right* d. *Dean & Chapter of Wells* v. *Bowden et al.* 3 East, 260.

(49) *Cob* v. *Betterson*, Cro. Jac. 374.

(50) *Brooks* v. *Brooks & Wright*, Cro. Jac. 434. S. C. Poph. 125; and see *Roe* v. *Loveless*, 2 Barnew. & Ald. 454.

(51) Co. Litt. 52. b. Co. Cop. s. 33. Tr. 65. *Gravenor & Ted*, 4 Co. 23. a. *Stanton* v. *Barnes*,

under a custom to grant for three lives, a grant for the lives of two, or for the life of one only, will be good (52).

By the same rule, under a custom to grant to three persons, *habendum* to them successively *sicut nominantur* and not *aliter*, the lord may grant to A. and his assigns for his own life and the lives of two others (53): so under a custom to grant for life he may grant *durante viduitate* (54); but a grant for a greater estate than is prescribed by the custom would be void (55).

There are in many manors both copyholds of inheritance and for lives, and such a custom is good; but a grant of the latter for lives, with a remainder in fee, would be void as to the remainder (56).

The lord cannot claim against his own acts (57): So if he consents to a condition or trust on the court rolls, he is bound by it; though if lands

Cro. Eliz. 373. *Kempe* & *Carter*, 1 Leo. 56. And see *Doyle* & *Wood*, Cro. Eliz. 431. S.C. Mo. 359.

(52) 2 Lord Raym. 995, 999.

(53) *Smartle* v. *Penhallou*, 1 Salk. 188. S.C. 3 Salk. 181. S.C. 2 Lord Raym. 999. S.C. 6 Mod. 66.

(54) *Down* v. *Hopkins*, 4 Co. 29. b. S. C. Cro. Eliz. 323. *Smartle* v. *Penhallow*, sup. Co. Cop. s. 33. Tr. 65.

(55) Co. Cop. s. 41. Tr. 90. Ib. s. 33. Tr. 65.

(56) Kitch. 170.

(57) Anon. 4 Leo. 88. ca. 186. *Wheeler's* case, ib. 240. In *Marke* v. *Sulyard*, Toth. 107, the grant of a copyhold at a court held out of the manor, was confirmed against the lord that made it. And see post, tit. 'Steward.'

escheat, he shall have them discharged of any trusts to which he is not privy (58); and in the *King* v. *The Inhabitants of Haddenham* (59), which was the case of a settlement by purchase, the pauper being an attainted person, but having been discharged by warrant under the sign manual, Lord Ellenborough, C. J. asked how the lord could impeach the title against his own admittance, upon the ground of an antecedent incapacity; and whether he must not proceed in all cases as for a subsequent forfeiture (60). But the lord is not always bound by the act of admittance; for, in *Right* v. *Bawden*, *ante*, it was held, that the admittance of the *cestui que vie*, did not extend the grant, and, therefore, that his widow could not hold (under a custom intitling the widow of a person dying seised to free-bench,) against the legal title of the lord of the manor.

It is said, that the lord may grant, or admit a tenant, out of court, or even out of the manor (61), and this, I conceive, he may do, when such grant

(58) *Burgess* v. *Wheate*, 1 Sir W. Bl. 167. Post, tit. 'Trust Est.' and tit. 'Forfeiture.'

(59) 15 East, 463.

(60) See the case of *Pay* v. *Guybon & Brown*, Cro. Eliz. 582, and Qu. if the lord grant a copyhold to A. on certain conditions, which are only in part performed, and A. after breach of one of the conditions surrenders to B., whom the lord admits, whether the lord can enter for a subsequent breach of the other conditions?

(61) *Melwich & Luter*, 4 Co. 26. b. Co. Litt. 60. b. Gilb. Ten. p. 217. 6 Vin. Cop. (N. b.)

or admittance is voluntary, of which nature is a grant by copy for a life or lives, in possession or reversion, upon the surrender of a former copy, (which it is to be observed was *Melwich* and *Luter's* case); but it is not quite clear that the lord can admit out of the manor, or even out of court, on the surrender of a copyholder of inheritance, to the use of a third person, or under a devise, except perhaps by immemorial custom (62); though possibly the admittance of an heir at law, where the lord's interest alone is concerned, may be good if made out of court, and even out of the manor, and without a custom in support of it.

What things are demiseable by Copy.

IT should seem that even a manor may be demiseable by copy (63); but it has been said, that the lord of the customary manor could not keep Courts Baron to have forfeiture, or hold pleas in a writ of right (64). Any profit, parcel of a manor, which lies in tenure, as tithes (65), under-

(62) Ante, p. 7.

(63) *Rex* v. *Stanton*, Cro. Jac. 259. S. C. (called *Rex* v. *Staverton*), Yelv. 190. *Moor* v. *Woodgame*, ib. 327. S. C. (called Sir *H. Nevil's* case), 11 Co. 17. a. Supp. Co. Cop. s. 17. Tr. 200. Co. Litt. 58. b. 6 Vin. Cop. (E.) pl. 5. Com. Dig. Cop. C. 1. [Aylesham in Norfolk is said to be held by copy, vide Compleat Eng. Cop. p. 50.] But see 1 Watk. on Cop. 32-3. Scroggs, 94.

(64) *Rex* v. *Stanton*, or *Staverton*, sup.

(65) 6 Vin. Cop. (E.) pl. 1. *Sir John Bourn's* case, cited

wood, herbage, or vesture of land (66), forecrop or prima tonsura (67); or which is appendant to that which lies in tenure; as an advowson, common, market, fair, piscary, or other thing appendant, may, by custom, be granted by copy: though an advowson or common, in gross, rents, bailiwicks, and such like, which do not lie in tenure, are not demiseable by copy (68).

Of Persons incapacitated to take as Grantees.

THE wife is incapable of taking under an immediate grant from her husband, so where on the death of the last tenant, the lord demised by copy to his wife, to hold to her and two others for their lives, and the life of the longest liver of them

Cro. Eliz. 413.; but see *Sands* v. *Drury*, Cro. Eliz. 814, and the observations upon it in *Musgrave* & *Cave*, Willes 323. Supp. Co. Cop. s. 17. Tr. 200.

(66) Co. Litt. 58. b. Co. Cop. s. 42. Tr. 97. *Hoe* & *Taylor*, Mo. 355. pl. 480. S. C. 4 Co. 30. b. 31. a. S. C. Cro. Eliz. 413. Jenk. 274. pl. 95. 6 Vin. Cop. (E.) pl. 3, 4.

(67) *Stammers* v. *Dixon*, 7 East, 200. 6 Vin. Cop. (E.) pl. 2. 1 Roll. Abr. 498. (A.) pl. 2.

(68) Co. Litt. 58. b. Co. Cop. s. 42. Tr. 97. 6 Vin. Cop. (E.) pl. 6, 7, 8, 9, 10. 1 Stra. 100. 1 Comy. 267. Gilb. Ten. 331-2. Calth. Read. 54. 1 Watk. on Cop. 32-3. Com. Dig. Cop. (C. 1.); and see *Sands* v. *Drury*, *Musgrave* v. *Cave*; and *Hoe* v. *Taylor*, sup. in which latter case, (see Cro. Eliz. 413.) Fenner J. said, he knew a market within the manor of Crookehorne, [Crokeham] in Somersetshire, to be demised by copy; and see Mo. 355, and the Compleat Eng. Cop. p. 138. [A mill

successively; the Court held, that it was a void grant (69).

It has frequently been said, that the same persons as are capable of a grant at common law, are capable of a grant by copy, and that *he* shall be a person sufficient to be a copyholder, who is able of himself, or by another, to do the service of a copyholder; but the latter position, taken in a limited sense, is controvertible; for though, under both positions, an infant or a feme covert may be a copyholder, as the guardian of the infant, and the husband of the feme copyholder, may do the services, yet the latter position would exclude a person *non sanæ memoriæ*, an ideot, a lunatic, an outlaw, or an excommunicate, from receiving a grant of a copyhold estate; and still we find it laid down that persons under those disabilities, as well as an infant and a feme covert, may be grantees of copyholds (70), and that the purchase by the wife shall stand in force until her husband disagrees.

The king cannot be a copyholder either in his corporate or natural capacity (71). And it is ge-

may be held by copy. *Green* & *Harris*, cited 4 Leo. 241, in *Ward's* case.]

(69) *Firebrass* d. *Symes* v. *Pennant*, 2 Wils. 254.

(70) Co. Cop. s. 35. Tr. 79. 6 Vin. Cop. (L.) pl. 6. cites Calth. Read. 51-2.

(71) Hard. 435-6 in *Rex* v. *Holland*. *Field* v. *Boothsby*, 2 Sid. 82. 1 Watk. on Cop. 31. cites Co. Litt. 1. b. Dy. 2. b. pl. 8. marg. Ib. 154. b. pl. 18; and adds, yet there are many instances of Kings holding lands of a subject in ancient

nerally supposed that a corporation cannot hold lands by copy of court roll (72).

It has been said, that an alien may be a copyholder, and that neither the king, or the lord, could seize the copyhold lands (73): But Mr. Watkins was of opinion, that an alien could not hold by copy (74.)

I apprehend, however, that if the lord will grant to or admit an alien, or any incapacitated person whatever, his interest will be concluded by such act of admittance or grant (75).

Of the Office and Power of the Steward, &c.

LORD COKE in his discourse on the antiquity and nature of manors and copyholds, very justly observes, that from the measure of authority and confidence committed to the steward of a manor, the lord would do well to be very careful in

days. See 1 Rob. Scotl. 8, and N. Stuart Diss. Antiq. Engl. Constit. p. 3. s. 3. p. 160. N. (6).

(72) 1 Watk. on Cop. 31. But Sir Edward Coke, in his Copyholder, says, "If a copyhold be granted to a *Dean and Chapter*, or to a *Mayor and Commonalty*, without any express estate, a perfect estate in fee passeth." s. 49. Tr. 113. And again, "If a copyhold be granted to an *Abbot*, and to *his heirs*, an estate for life only passeth." s. 49. Tr. 114.

(73) Calth. Read. 52. 6 Vin. Cop. (L.) pl. 7.

(74) 1 Vol. on Cop. 31; and see 6 Vin. Cop. (L. e. 2.) pl. 2, 3. post, at the end of tit. 'Forfeiture.' *Eaton's* case, Litt. Rep. 23.

(75) See *The King* v. *the Inhabitants of Haddenham*, 15 East 463; *vide* also as to incapacities of grantees, Sugden on Vendors, 500 to 503. [5th ed.]

making his choice; for, if he be defective in any one of these three qualities, knowledge, trust, or diligence, the lord may be much prejudiced; and he quotes the counsel given to the lord by Fleta:—"Provideat sibi dominus de senescallo "circumspecto et fideli, qui in legibus consuetu- "dinibusque provinciæ, et officio senescalciæ se "cognoscat, et jura domini sui in omnibus tueri "affectet, quique ballivos domini in suis erro- "ribus et ambiguis sciat instruere et docere, "quique egenis parcere, et nec prece, vel precio, "velit à tramite justitiæ deviare, et perversè ju- "dicare (76)."

In the king's manors, a steward cannot be retained by parol of the auditor or receiver, but the appointment should be by patent (77); and a corporation cannot institute any such officer except by deed (78); but in all other cases a steward may be appointed by parol (79), though not for life, or years, it should seem (80).

(76) Co. Cop. s. 45. Tr. 103.

(77) Co. Tr. 104-5. *Harris & Jay*, 4 Co. 30. a. S. C. Cro. Eliz. 699. It is said that a steward appointed by the lord in the absence of the steward by patent, may hold a court and take a surrender and admit the surrenderee. Kitch. 162. cites 2 Ed. 6. tit. 26.

(78) Co. Cop. s. 45. Tr. 105. *Owen* v. *Saunders*, 1 Ld. Raym. 160-1. See also Kitch. 164. Nels. Lex Man. App. pl. 34.

(79) Co. Cop. s. 45. Tr. 104. Co. Litt. 61. b. *Harris* v. *Jay*, sup. *Lady Holcroft's case*, 4 Co. 30. b. *Smithson* v. *Cage*, Cro. Jac. 526. *Blagrave & Wood's* case, 1 Leo. 227, 228. cites 21 H. 7. 36-7. S. C. Godb. 142. *Down* v. *Hopkins*, 4 Co. 30. a. Dyer, 248. pl. 79. 19 Vin. Ab. Steward, (F). Com. Dig. Cop. (R. 5.) Ib. Leet, (M. 1.) Scroggs, 88.

(80) *Blagrave & Wood's case*, sup. Dyer, 248. 1 Lord Raym.

And even where a patent or writing is essential, it is in respect to voluntary acts only, as giving license to copyholders to alien by deed(81) and not to ministerial acts(82).

But it is usual and proper to retain a steward by deed; a form of appointment will be found in the Appendix.

A steward, *de jure*, may grant lands which escheat, even without special warrant, but not in opposition to the express commands of his principal(83); and he may take a surrender, and examine a feme covert as to her voluntary consent thereto(84) out of court, nay, out of the manor(85), and a custom, that he should not do

159. See the pleadings in an action of debt by a steward appointed for life, to recover the arrears of an annuity. *Nevill* v. *Rede*, Nels. Lex Man. App. pl. 33. And note, that a steward appointed by deed or patent may recover his salary by writ of annuity. Dy. 248. a. pl. 79.

Vide also *Nevill's* case, 7 Co. 33. b. where it is said that the office of steward, receiver, or bailiff of a manor, may be intailed within the statute *de donis*, because it is exerciseable within lands, cites 5 E. 4.

(81) See Scroggs, 87. Post, tit. 'Licenses, &c.'

(82) *Harris* & *Jay*, ante. *Knowles* v. *Luce*, Mo. 112.

(83) *Harris* & *Jay*, ante. Scroggs, 91. But a steward *de facto* could not grant lands that escheat, or perform any other voluntary act, post, (n. 97).

(84) *Smithson* v. *Cage*, Cro. Jac. 526; and even though the surrender be to his own use, *Erish* v. *Rives*, Cro. Eliz. 717.

(85) *Tukely* & *Hawkins*, 1 Ld. Raym. 76. *Dudfield* v. *Andrews*, 1 Salk. 184. *Housego* & *Wild*, M. 13 Jac. B. R. 6 Vin. Cop. (X). pl. 3. 2 Danv. 181. F. pl. 1. 1 Roll. Abr. 500. F. pl. 3. Kitch. 162. It was said by Anderson in the case of *Bright* & *Forth*, that surrenders

so, would be void (86). This is perfectly reasonable, as the delay in convening a court might be extremely prejudicial to a copyholder desirous of making a surrender of his estate.

There is much conflicting authority on the question, whether a steward of a manor can grant or admit out of court, though it is considered to have been settled, that he cannot do so out of the manor (87); and yet it is to be observed, that Mr. Watkins urges (88) on the authority of *Melwich's* case, and *Dudfield* & *Andrews* (ante), that a steward may admit, not only out of court, but, as a consequence, out of the manor; and, as his arguments in favour of the steward's power to admit *out of court*, are founded on, so they are greatly supported by, the principle, that copyholders had not originally a negative voice

were by custom, and therefore they ought to be in the court of the manor, and that a surrender to the lord himself in his house, or out of court, was not good. Quod. Beaumont concessit. Cro. Eliz. 442.

In *Blagrave* & *Wood*, Godb. 142, it was held *per tot. cur.* that a steward by parol could not take a surrender of copyholds out of the manor. And see 1 Lord Raym. 159. Sed vide contra *Holcroft's* case, 4 Co. 30. b. See also *Smithson* & *Cage*, Cro. Jac. 526.

Whether there is any distinction between a steward of a manor, and a steward of a court, See 1 Leo. 227, in *Blagrave* & *Wood*; and Scroggs, 88.

(86) *Tukely* & *Hawkins*, sup.

(87) *Melwich* & *Luter*, 4 Co. 26. b. *Tukely* & *Hawkins*, sup. *Clifton* & *Molineux*, 4 Co. 26-7. 1 Roll. Abr. 527. pl. 3. Ib. 505. pl. 4. Kitch. 162. to 165. 6 Vin. Cop. (N. b.) *Lord Dacre's* case, 1 Leo. 289. 2 D'Anvers, 179, 189. Scroggs, 87.

(88) 1 vol. on Cop. 253.

upon the admittance of a new tenant, and, therefore, that their presence on an admission is not necessary (89).

I have, however, already stated my doubts, whether the lord of the manor himself can grant or admit out of the manor, or even out of court, when the act is not voluntary, and if not, *à fortiori*, a steward cannot do so. It appears to me, that the singular distraction of authorities on this particular point might be reconciled, by distinguishing between the voluntary act of the lord, or his steward, and that which is merely ministerial, and, therefore, involving the interest of a third party; and, if I am right in this suggestion, it follows, that, unless the act is voluntary, neither the lord nor the steward can grant or admit out of court (90); except perhaps by immemorial custom (91), or in the case of an heir at law, where the lord's interest alone is concerned. And I would submit, that the distinction is favoured, not only by the general practice of calling a special court, whenever an admittance is required in the intervening period between the general courts, but by the expediency, if not the necessity, of a previous presentment by the homage, of the surrender or relative circumstances of title, upon which the claims of the person requiring to be admitted are founded; a form (if

(89) Vide also *Lord Dacre's* case, 1 Leo. 289.

(90) But as to the lord, see the 4th resolution in *Melwich & Luter*, 4 Co. 26. b.

(91) Kitch. 165.

it merits the appellation,) which is well calculated to prevent litigation, by securing to the rightful claimant the sanction and protection of the legal estate; and the importance of this object induces me to think, that even if an admittance out of court by the lord of the manor, upon a surrender by a copyholder to the use of a third person, is good, yet that a steward has not that power, except by custom or by express authority from the lord.

It is scarcely necessary to add, that a steward cannot, in the opinion of the writer of these comments, either grant or admit *out of the manor*, without a special custom, as, for instance, where a court is held within one manor for several manors (92).

A grant of the stewardship of a court baron to two, even for a term of years, is good, but the appointment determines with the lives of the grantees, and will not go to the executors or administrators:—the appointment may be in reversion (93); and a court may be held by

(92) Ante, p. 7. Cro. Car. 367.

(93) *Sir Robert Howard* v. *Wood*, T. Jones, 126-7. S. C. 1 Freem. 473. S. C. 2 Lev. 245. S. C. 2 Sho. 21. *Walton's* case, Dy. 270. b. 16 Vin. 'Offices.' F. 3 Bac. Abr. 735. And even *in futuro* it is said, as it varies from the case of land, *Ferrer* v. *Johnson*, Cro. Eliz. 336. But see *Sir John Savage's* case, Dy. 259. a. It should seem that a judicial office, or an office that is partly ministerial and partly judicial, cannot be granted in reversion, except perhaps by the King, and therefore that the grant by a common person of the stewardship of a court leet, or of a *customary* court

one of two joint stewards appointed by patent (94).

If the steward of a manor is under any disability, as being an infant, an outlaw, or *non compos mentis*, yet it is said, that such acts as he shall do as incident to his office, cannot be avoided (95); and I am apprehensive, that although an infant cannot sit as judge in a court leet, yet that he may preside in a court baron, where the suitors are the judges, and perform all ministerial offices, at least, in a customary court baron (96).

A steward *de facto* may execute any ministerial act, because the tenants are not compellable to enquire into the lawfulness of his authority: But if a person without any colour of authority, as a stranger without the appointment of the lord, or

baron, in reversion, would be void. *Curle's* case, 11 Co. 4. *Howard & Wood*, sup. See also Vin. and Bac. Abr. as above. According to the case of *Howard & Wood*, a grant in reversion of the stewardship of a manor, comprehending both court leet and court baron, would perhaps be void only as to the court leet, the offices being distinct; but see ante, p. 6.

(94) *Knowles & Luce*, Mo. 111, 112. 1 Comy. 83. But see *Anon.* Gouldsb. 2. pl. 4. Jenk. 246. pl. 35.

(95) Co.Cop. s.45.Tr.104-5. Gilb. Ten. 315, 316-17. Com. Dig. Cop. (R. 5.) And see *Scambler's* case, as cited by Jones Just. in *Young* v. *Fowler*, March, 43, and as cited S.C. Cro. Car. 556.

(96) *Scambler & Waters*, Cro. Eliz. 637. S.C. cited Co. Litt. 3 b. n. 4. 1 Roll. Abr. 731. 2 ib. 153. Mar. 41. And see Scroggs, 89. Vide also *Yonge* v. *Stowell*, Cro. Car. 279. S.C. Sir W. Jones, 311. Gilb. Ten. 315 to 318.

consent of the right steward, will hold a court, it should seem that his acts will be void, especially if the court is not regularly convened (97).

Distinctions have been made between the authority of a steward and his deputy (98), but, as I conceive, without any justifiable reason; for such powers as the lord of a manor may think proper to give by the instrument of appointment, or as a steward appointed by parol may exercise, are surely exerciseable by an under steward, unless a limited authority is expressed in his deputation, and then the special purpose or turn only, for which he is deputed, will, of course, be the extent of his power (99).

It may, however, admit of a doubt, whether the steward of a manor can appoint a deputy, without an express authority under the terms of his own appointment, especially in the case of the king's manors (100); but where that power is given to him, I apprehend he may depute an under steward, either by writing or parol (101).

(97) Kitch. 164. Co. Cop. s. 45. Tr. 105. *Knowles* v. *Luce*, Mo. 112. *Harris* v. *Jay*, Cro. Eliz. 699. *Parker* & *Kett*, Lord Raym. 660. S. C. 1 Salk. 95-6. S. C. 1 Comy. 84. S. C. 12 Mod. 470. 1 Leo. 227. 19 Vin. Abr. Steward of Courts (G).

(98) Co. Cop. s. 46. Tr. 107. Kitch. 162. to 165.

(99) Gilb. Ten. 447-8. 19 Vin. Abr. Steward of Courts (I). 1 Salk. 96.

(100) Keilw. 54. b. *Earl of Rutland* v. *Spencer*, 4 Leo. 244. 2 Brownl. 337; but see 9 Co. 48. a. & b. S. C. called *The Earl of Shrewsbury's* case.

(101) Co. Cop. s. 46. Tr. 107. In the case of *Heggor* & *Felston*, 4 Leo. 111, a copyholder being

In the case of *Burgesse* & *Foster* (102), and in *Burdet's* case (103), the surrenders were taken by a deputy steward, but there the chief stewards were to execute the office by themselves, or their sufficient deputy. And it was held in those cases, that, although the authority to take the surrenders was absolute, and they were taken upon condition, yet the deputations were well executed.

A deputy steward may hold a court either in his own name, as deputy steward, or in the name of the chief steward (104), but it is more regular to act in the name of the principal.

In *Lord Dacre's* case (105), a grant by copy made by a sub-deputy was held to be good, but the copy there was sub-signed by the lord of the manor, and there was a custom, that the steward or his deputy might take surrenders and grant estates by copy.

And in *Parker* v. *Kett* (106), a surrender out of court, made within the manor to a sub-deputy, was adjudged to be valid, and there was no evidence in that case of any custom, or of any act of the lord or steward, in support of the surrender; but it is to be observed, that the chief

in Ireland, the steward deputed a person to take the surrender there, and the surrender was held to be good.

(102) 1 Leo. 289. S. C. 4 Leo. 215.

(103) Cro. Eliz. 48.

(104) *Parker* v. *Kett*, ante, p. 132.

(105) 1 Leo. 288.

(106) Sup. and see 2 vol. Watk. on Cop. 26, 27-8.

steward was constituted by patent, to exercise the office by himself or his sufficient deputy.

It has been thought, that the office of a steward is absolutely essential (107), but I have not been able to find any authority denying the lord of a manor the privilege of holding his own courts; on the contrary it is laid down in various books, that the *lord* or his steward is the judge in the customary court (108), which seems fully to establish the right of the lord to preside in person, if he pleases.

The appointment of a steward is generally during the lord's pleasure only, and, even when made for life, or any stated period, the office may be forfeited by mis-user, non-user, or refuser (109):

(107) Supp. Co. Cop. s. 3. Tr. 149. Fisher on Copyholds, 58. cites *Withers* v. *Iseham*, Dyer, 70. (pl. 37); and see *Cholmely* v. *Morton*, 2 Sho. 180.

(108) Kitch. 163-4. Co. Litt. 58. a. 4 Co. 26. b. Sir Edward Coke considered the steward merely as the representative or deputy of the lord, *in his absence*. Co. Cop. s. 45. Tr. 102. And see 2 Watk. on Cop. 22, 23-4.

(109) See 9 Co. 50. a. in *the Earl of Shrewsbury's* case. Vide also Co. Cop. s. 45. Tr. 106-7, where these causes of forfeiture are thus stated: viz. "1. By *Abuser*. As if the steward burn the court rolls, or if he taketh a bribe to wink at any offence, or use partiality in any cause depending before him. 2. By *Non-user*. As if the steward by his patent being tied to keep court at certain times of the year, without request to be made by the lord, faileth, and by his failure the lord receive any prejudice, this is a forfeiture. But if the lord be not damnified, then this non-user is no forfeiture. 3. By *Refuser*. As if the steward tied by his patent to keep court

but in a stewardship for life the appointment would not be revoked by a subsequent sale of the manor, and this because of the casual profits incident to the office (110), which could not be determined but with the existence of the manor (111).

Should the steward be disturbed in his office, his remedy is by an action on the case (112).

upon a demand or request to be made by the lord, if the lord demandeth or requesteth him to keep a court, and he faileth; this is a forfeiture, though the lord be thereby nothing damnified." [N.B. Non-user of itself without some special damage, is no forfeiture of private offices. Co. Litt. 233. a.]

In the case of an attorney whose stewardship is determined, the court of law of which he is admitted, will exercise a summary jurisdiction to compel him to deliver up the court rolls of his employer. Ex parte *Corpus Christi College.* 6 Taunt. 105.

(110) Co. Litt. 233. b. *Harvy* v. *Newlyn,* Cro. Eliz. 859. Co. Litt. 233. b. And see Vin. Abr. 'Officer' (O. 4.) pl. 5 & 6. Br. Graunts. pl. 93, 134.

(111) *Sir Charles Howard's* case, Cro. Car. 60. "Two jointenants grant the stewardship thereof to one, and £20. per annum for the exercise of it; if the one discharge him, it is a good discharge, as to the service, but yet he shall have his fee: If the lord of a manor grant the stewardship thereof to another, taking £10. per ann. of the issues and profits of his court there for his fee, and afterwards the lord dischargeth the steward, the same is void; for it is a disadvantage to the steward, for he cannot have his fee if no courts be holden; but if the fee be limited to issue out of lands, there such discharge is good; for there the steward shall have his fee, although that no courts be holden there, See 18 E. 4. 8. to that purpose." By Tanfield arg. in *Goore* and others v. *Dawbeny,* 2 Leo. 76.

(112) *Ferrer* & *Johnson,* Cro. Eliz. 335. *Harvy* & *Newlyn,* sup. And see the pleadings

The office of a bailiff of a manor is clothed with much less important trust and discretion (113), and I am not aware that any doubt is entertained of the power of the lord or chief steward, to appoint a bailiff by parol (114), or of the appointment being good when made by the steward, without any special authority for that purpose.

in an action for disturbing a deputy steward, where the chief steward was appointed by a Corporation. *Anon.* Nels. Lex Man. App. pl. 34.

(113) 3 Ed. 2. Tit. Avowry. 2 Ed. 4. 4. 12 H. 7. 14. 21 H. 7. Keilw. 158 b. *Gybson* v. *Searl*, Cro. Jac. 176. But it should seem, that if the lord of a manor be beyond the sea, the writ of right is to be directed to the bailiff of the manor. 1 Leo. 228 in *Blagrave* & *Wood's* case.

(114) *Blagrave* & *Wood*, sup. cites 12 H. 7. 25, 26, 27.

CHAP. IV.

OF THE SURRENDER AND OTHER COPYHOLD ASSURANCES,

[reserving the subject of Surrender to Will, and of Devise, for distinct consideration.]

THERE can be no substitution of a person into the tenancy, but by a *surrender*, nor is such substitution compleat until admittance.

So if two copyholders are desirous of exchanging their copyhold lands, it can only be effected by surrendering to the use of each other, and each being admitted under such respective surrenders (1).

The word "surrender" is said by C. J. Coke to be *vocabulum artis*, and to admit of no qualified term (2), but this rule does not extend to the lord, for between a tenant and him, the conveyance need not be according to the custom, but may be made by bargain and sale, or other less formal act (3); and in *Blemmerhasset* v. *Hum-*

(1) Kitch. 171. Co. Cop. s. 36. Tr. 83. but a different mode of transferring the copyhold interest, is sometimes pointed out by act of parliament, as in the case of a conveyance of copyholds by commissioners of bankrupt, ante, p. 100.

(2) Co. Cop. s. 39. Tr. 86.; and see 6 Vin. Cop. (U.) pl. 2.

(3) *Blemmerhasset* v. *Humberstone*, Hut. 65; S. C. Sir W. Jones, 41. *Hasset* v. *Hanson*,

berstone (4), Lord Hobart thought, that a copyholder declaring himself weary of his copyhold, and *requesting the lord to take it*, was equal to a surrender.

Mr. Watkins contends, that the rule does not extend even to a return of the copyhold into the lord's hands, for the purpose of being conveyed to a stranger (5), unless the rights of a third person are prejudiced, as was the case in *Zinzan* & *Talmadge* or *Talmash* (6), where the first *cestui que vie* was allowed by the custom to destroy the whole estate by surrendering into the lord's hands, and it was held, that his joining with the lord in levying a fine of the lands, did not operate as a surrender within the custom. When the act is such as amounts to an absolute relinquishment of the estate to the lord, it would certainly seem, that the above rule is not applicable, although the lord subsequently grants the estate out again to the nominee of the copyholder; but when the lord is merely the conduit pipe of assurance to a third party, it may be doutful whether the word '*surrender*' is not essential to conclude the interest of the heir at law (7).

Win. 66-7. *Wakeford's* case, 1 Leo. 102. Gilb. Ten. 252-3. Ib. 300-1. Ib. 311-12. Ib. Watk. N. 115.

(4) Hut. 65. and see 6 Vin. Cop. (Z.) pl. 17. *Coleman* v. *Bedill*, 1 And. 199. S.C. called *Coleman* v. *Portman*, 1 Leo. 191. pl. 273.: sed vide 1 Roll. Abr. 502. (L.)

(5) 1 vol. on Cop. 55.

(6) Pollexf. 564. S.C. Sir T. Raym. 402. S.C. 2 Show. 130. S. C. T. Jones, 142. S.C. 1 Freem. 263.

(7) Calth. Read. 57, 58-9.

The case of *Belfield* & *Adams*, 3 Bulst. 80. cited in Gilb. Ten. 253-4, and quoted by Mr. Watkins (8) to prove that a copyhold may be surrendered by implication, is clearly in opposition to the dictum of Sir Edward Coke, that the word 'surrender' is *vocabulum artis*, but this case is by no means to be relied on as an authority, even according to the notice taken of it by Chief Baron Gilbert, who thus expresses himself: "Copy-"holder in fee comes into court, and there ac-"cepts a copy to himself for life, remainder to "his wife for life, remainder to his son for life; "this is tantamount to a surrender to the use of "himself, &c. but he hath his old reversion in him; "for there is no ground to make a surrender of "that by construction, because he has made no "disposition of it. But as this case is in *Rolls* (9), "it is said, that it was no surrender; for that a "copyhold cannot be surrendered by a surrender "in law, but only by actual surrender; yet as it "is in other places in *Rolls*, it is, as in *Bulstrode*, "held to be a surrender, but that the reversion "was still in the copyholder."

How Surrenders are to be made, and into whose hands.

Surrenders are made in various forms, — in

6 Vin. Cop. (Z.) pl. 8, 10, 15. Ib. Cop. (L. a.) pl. 1. Kitch. 169, 170-1.

(8) 1 vol. on Cop. 58. and see S. C. (called *Southcot* & *Adams*) 1 Roll. Rep. 256. 2 D'Anv. 183. (L.) pl. 1.

(9) 1 Roll. Abr. 501. (L.) (*Shephard* & *Adams*), but see M. 13 Jac. B. R. cited ib.

some manors by a rod, in others by a straw, in others by a glove; which symbol is delivered over by the surrenderor to the steward, or other person taking the surrender, in the name of seisin.

A surrender must be taken by the lord, or his steward, or the deputy steward (10), though, by special custom, it may be into the hands of two tenants of the manor, or of one tenant, or into the hands of the bailiff in the presence of two tenants, or into the hands of a tenant in the presence of other persons (11); but the custom must be pleaded (12).

And a tenant is not liable to an action for refusing to take a surrender (13).

The heir is a copyholder to many purposes before admittance, and, as it would seem, may take a surrender (14).

But, as the copyhold interest ceases on attain-

(10) *Dudfield* & *Andrews*, *Tukely* & *Hawkins*, *Parker* & *Kett*, ubi sup. And a surrender may be made into the hands of a steward to his own use, *Erish* v. *Rives*, Cro. Eliz. 717. 1 New Abr. 473. Gilb. Ten. 277.

(11) Co. Litt. 59. a. Kitch. 201. *Page* v. *Smith*, 3 Salk.100. *Beany* v. *Turner*, 1 Lev. 293. S. C. (called *Turner* & *Benny*,) 1 Mod. 61. S. C. (called *Turnor* v. *Benson*,) 2 Keb. 666. and see 1 Watk. on Cop. 78. n. [2nd ed.] where he notices a custom to surrender, &c. in the presence of "sufficient witnesses," though not tenants.

(12) *Freeborn* v. *Purchase*, Sty. 107. All. 68-9. Co. Litt. 59. a. but see *Beany* & *Turner*, or *Turner* & *Benny*, sup.

(13) *Forde* v. *Hoskins*, 1 Roll. Rep. 126.

(14) *Munifas* v. *Baker*, 1 Keb. 25. 4 Co. 22. b. Post, tit. 'Admittance.'

der, a copyholder cannot take a surrender after attainder, even though he is pardoned (15).

Whether a Surrender can be made by Attorney.

A doubt has existed in practice, whether a copyholder could surrender by power of attorney; and this doubt has received some sanction by a case in which two Judges are reported to have held, against the opinion of a third Judge, that a surrender by attorney was not good, and that if the copyholder could not attend in person, the lord should appoint a special steward to take the surrender (16).

But, I apprehend, that there can be no good reason assigned for this distinction between freehold and copyhold assurances, and that in all cases such acts as a copyholder can do himself, he may authorise another to do for him, at least in the court of the lord, or before the lord or his steward out of court, and without any special custom for it (17).

And yet it should seem that a surrender which is warranted only by special custom, must be made in person, as if there be a custom that an infant may surrender at the age of discretion (18).

(15) *Benison* v. *Strode*, T. Jones, 189, 190.

(16) See 1 Leo. 36. ca. 45.

(17) *Combes's* case, 9 Co. 75. *Parker* & *Keck*, 1 Comy. 85. *Warner* v. *Hargrave*, 2 Roll. Rep. 393. 1 D'Anv. 665. Authority (A.) marg. 2 D'Anv. 181. (G.) 1 New Abr. 462. (D.) Godb. 389. and see 1 Watk. on Cop. 67. n. (p).

(18) Co. Cop. s. 34. Tr. 78. Note.

It is certainly the constant practice to admit of surrenders by power of attorney, and, in such cases, it is usual, and very proper, for the steward to inrol the power, which should be copied *verbatim* at the end of the court roll of the particular day. The reader will find, that in *Hardy* v. *Reeves* (19), the heir of the mortgagee gave a power of attorney to be admitted, and afterwards *to surrender* to a person who purchased subject to the equity of redemption: and that in the *Attorney General* v. *Vigor and others* (20), no question was made on the validity of a power of attorney to be admitted, and afterwards *to surrender* to the use of the will of the copyholder.

And even a custom for a copyholder to make letter of attorney to two copyholders to surrender after his death, has been held to be good (21).

It has, however, been decided, that where a custom is alleged, that a surrender must be in person, the purchaser is not compellable to accept of a surrender by attorney, *Mitchel* v. *Neale* (22): neither can a copyholder be compelled to surrender by attorney (23).

Deeds of infants which do not take effect by delivery of their own hands are void; but such as take effect by delivery of their own hands, are voidable only. Perk. s. 12, 13. Post, N. (24) and (47).

(19) 4 Ves. Jun. 466.

(20) 8 Ves. Jun. 265.

(21) *Roby* & *Twelves*, Sty. 423. and see *Watkis* v. *Bucknal*, ib. 291, 311.

(22) 2 Ves. 679.

(23) *Symms* v. *Smith*, Cro. Car. 299. S. C. Godb. 445.

In *Mitchel* & *Neale*, the Chancellor said, that a surrender by attorney cannot be out of court, for that would be for an attorney to make an attorney, which, unless there is a special power in the letter of attorney for that purpose, an attorney cannot do: but this, I conceive, must mean where the surrender is into the hands of the lord, by the hands of customary tenants, or of the bailiff or reeve, pursuant to a special custom; and it has been decided, that a copyholder cannot make such a surrender by attorney, unless it is expressly authorised by the custom (24).

It is also settled that a person who has a bare authority, as an executor empowered to sell land, cannot surrender by attorney (25).

And an authority by special custom, though joined with an interest, cannot be executed by attorney (26).

An attorney may surrender either in the name of his principal or in his own name (27), but in the latter case the power should be referred to;

(24) *Combes's* case, ante, cites *Chapman's* case, 1 Roll. Abr. 500. Co. Cop. s. 34. Tr. 78. Co. Litt. 59. a. Ante, p. 141.

(25) *Combes's* case, sup. *Warner* & *Hargrave*, ante. Co. Cop. s. 34. Tr. 78. And this rule, I conceive, extends to persons who derive a power over the fee of copyholds, under an act of parliament.

(26) As if there be a special custom, that a copyholder *for life* may make estate for 20 years, to continue after his death. Co. Cop. s. 34. Tr. 78.

(27) *Combes's* case, sup. *Parker* & *Kett*, 1 Salk. 96. S. C. 1 Ld. Raym. 659. S. C. 1 Comy. 83. S. C. 12 Mod. 468. But see contr. 2 Ld. Raym. 1419. which, however, is not considered any authority.

and an attorney may act although his principal is present (28).

According to the authority of Lord Coke (29), an infant or feme covert, and almost every other person, under whatever disability, may be an attorney to surrender for another, the act being merely ministerial; but a power of attorney cannot be given by a person under disability, unless authorised by act of parliament, as under the acts of 9 Geo. 1. c. 29. and 47 Geo. 3. sess. 2. c. 8. (30)

An attorney must pursue his authority strictly, according to his appointment, (which must be by deed,) and consistent with the custom of the manor (31), but if he exceeds his authority, the excess only will be void (32).

Of the Surrenderor and Surrenderee, and first of

BARON and FEME.—A surrender by a feme copyholder is suspended by marriage (33); and after marriage her surrender is void, unless she signifies her free will and consent under a private examination by the lord or by the steward, or

(28) *Mitchel* & *Neale*, sup.

(29) Co. Litt. 52. a. And see Harg. and Butl. ib. n. (2).

(30) See these Acts in the Appendix.

(31) *Combes's* case, ante. Co. Litt. 52. a.

(32) Co. Cop. s. 41. Tr. 93.

(33) *George* d. *Thornbury* v. *Rippon* & *Dawding*, Amb. 627. 473. marg. And I apprehend that a power given to a feme covert during the first marriage, even if to be exercised notwithstanding her then, or any future coverture, would be suspended by a second marriage.

his deputy (34); and by special custom a wife may be privately examined as to her consent, before two tenants (35).

It is a moot point whether the examination of a feme covert in copyhold cases, stands on the same footing as the private examination under a fine, in freehold cases, and it is therefore always desirable to enquire into the usage of the manor; but according to the case of *Smithson* & *Cage* (36) the examination of a feme covert, by the lord or his steward, would be good, even without any special custom to warrant it.

We have already seen that a custom for the wife to dispose of her copyhold estate without the assent of her husband, could not be supported (37).

And it has been doubted, whether the surrender of a married woman alone, without her husband, is good, though he should be present, unless warranted by immemorial usage (38).

But it would appear, that a custom for the wife alone to surrender, with the assent of her husband, is good, and that the husband's pre-

(34) *Smithson* & *Cage*, Cro. Jac. 526. *Burdet's* case, Cro. Eliz. 48. *Burgess* & *Foster*, 1 Leo. 289.

(35) *Erish* v. *Rives*, Cro. Eliz. 717. *Driver* d. *Berry* v. *Thompson* and another, 4 Taunt. 294.

(36) Cro. Jac. 526.

(37) *Stevens* d. *Wise* v. *Tyrrell*, 2 Wils. 1. Ante, p. 29, 95. But see *Compton* v. *Collinson* and others, 2 Bro. Ch. Rep. 377. S. C. 1 H. Bl. 334. Belt's Supp. to Ves. Sen. 121-2.

(38) *Taylor* v. *Philips*, 1 Ves. 229. Belt's Supp. 119, 258. And see *Stevens* d. *Wise* v. *Tyrrell*, sup.

sence, or his covenant in a deed of separation, that she might dispose of her estate, would create the presumption of his consent (39): and, indeed, it was held in *Compton* & *Collinson* (40), that under such a covenant, copyhold lands, which had descended to the wife, might be surrendered by her without her husband's joining, and without a special custom.

And it should seem that a surrender by husband and wife of the wife's lands, she being privately examined, is good, by custom, even if the wife is an infant (41).

It is very common, on the sale of copyhold estates, where the wife is dowable by the custom of the manor, to join her in the surrender to the purchaser; but this is totally unnecessary, it being a settled principle, that the freebench of the wife is defeated by the alienation of the husband, or even his contract for sale; unless, indeed, as to copyhold estates within manors where gavelkind tenure prevails, and there it is essential

(39) *Skipwith's* case, 3 Leo. 81. 4 Leo. 148. Godb. 14, 143. Mo. 123. ca. 268. 2 Brownl. 218. And see S. C. 2 D'Anv. 430. but the custom is not correctly stated there. See 2 Wils. 1, 2. and see *Compton* v. *Collinson*, ante p. 145. 1 Atk. 617.

(40) Sup. And see Year Book, 17 Ed. 3. 52. & 78. 17 Ass. pl. 17. 1 Roll. Abr. 846. (N). Com. Dig. tit. Bar. and Feme, (P. 1.) Fitz. Abr. *cui in vita*. pl. 19. 31. Co. Litt. 112. a. 132. b. 133. a. *Countess of Portland* v. *Prodgers*, 2 Vern. 104. *Skipwith's* case, sup. *Mary Portington's* case, 10 Co. 43. a. Co. Ent. 576. *Daniel* v. *Ubley*, W. Jones, 137. Latch. 39, 134.

(41) Litt. Rep. 274. 2 H. Bl. 345.

that the wife should join in the surrender, and be privately examined as to her uncontrolled assent, the same as on a surrender of her own customary estate. The practice of joining the wife in the surrender when unnecessary, is very objectionable, and should be discountenanced by stewards of manors, as it is putting upon the face of the court rolls constructive evidence of a custom, which, in point of fact, does not exist.

Though copyholds are not within the statute of uses, they may be surrendered by a husband to the use of his wife, the conveyance being not immediately to her, but mediately by the lord into whose hands the surrender is made (42): And the case of *Driver* d. *Berry* v. *Thompson* (43) has decided, that a copyhold estate may be limited by the husband and wife, to such uses as shall be appointed by the will of the wife, and that her appointment by will in the husband's lifetime is good.

The reader is here reminded that a surrender by the husband, of copyhold lands belonging to his wife, or by a copyholder of lands whereof he is seised for a customary estate tail, does not work a discontinuance (44).

(42) *Bunting* v. *Lepingwel*, 4 Co. 29. b. Co. Cop. s. 35. Tr. 79. Gilb. Ten. 220.

(43) 4 Taunt. 294. And see *Peacock* v. *Monck*, 2 Ves. 191. Belt's Supp. 323-4.

(44) Ante, p. 59, 60.

AN INFANT is not bound by a surrender, except by special custom (45), consequently he may enter at full age, and is not put to his plaint in nature of a *dum fuit infra ætatem*, even though the surrenderee has been admitted (46); yet a surrender by an infant, if it is for his benefit, is voidable only, and not *ipso facto* void (47); therefore an infant may surrender a copyhold held for lives, for the purpose of effecting a renewal, subject to his right of avoiding the transaction when of age; it should, however, appear on the face of the surrender, that such renewal is beneficial to the infant (48).—But a power over copyholds cannot be executed by an infant, when it is coupled

(45) Ante, p. 146. By the custom of the manor of Panington an infant of 12 years may surrender. *Lyde* v. *Somister*, Tr. 15. Car. Toth. 173. And in *Nayler* & *Strode*, 2 Ch. Rep. 392, a surrender of a copyhold by an infant of 4 or 5 years of age was allowed.

(46) Gilb. Ten. 277. *Knight* & *Footman*, 1 Leo. 95. S. C. (*Knight* & *Fortipan*) Cro. Eliz. 90. *Bullock* v. *Dibley*, Mo. 596. Poph. 39. *Gooles* v. *Grane*, Mo. 597.

(47) *Zouch* & *Parsons*, 3 Burr. 1794, 1804. Co. Litt. 51. b. (n. 3.) *Ashfield* v. *Ashfield*, W. Jones, 157. And Perkins, s. 12. says, "All gifts grants "or deeds made by an infant, "which do not take effect by "delivery of his hand, are "void: but gifts, grants or "deeds made by an infant by "matter in deed, or in writing, "which take effect by delivery "of his own hand, are voidable by himself, and his "heirs, and by those which "shall have his estate." And see ante, p. 141-2.

(48) *Zouch* & *Parsons*, sup. And an infant trustee may be compelled to surrender copyholds under the stat. 7 Anne, c. 19. Ante, p. 101.

with an interest, any more than in freehold cases (49).

A person who is not in the seisin, as a contingent remainder-man, or the heir in the lifetime of his ancestor even although he should survive the ancestor, cannot surrender; for a surrender, which passes nothing into the hands of the lord, does not operate by way of estoppel; therefore, where a copyhold was devised to A. for life, remainder to B. for life, and after his decease to such of the testator's nieces, (daughters of A.) as should be then living, as tenants in common in fee, and the six nieces were admitted in reversion, each to an undivided sixth part, and sold and surrendered their shares to B., (four only surviving B., of whom three afterwards died;) the surviving niece, and the heirs of the other three who survived B., recovered in ejectment against the devisee of the purchaser of B. (50).

(49) *Hearle* v. *Greenbank*, 1 Ves. 299. 3 Atk. 695.

As to powers which an infant may exercise, see Powell on Powers, 43. Sugden on Powers, 136 et seq.

And for the effect of a conveyance by commissioners in bankruptcy, with respect to powers vested in the bankrupt, see Sugden on Powers, 154. Note also, that it was decided in *Thorpe* v. *Goodall*, 17 Ves. 388, 460. that a bankrupt cannot be compelled by decree in equity, to execute a power for the benefit of his creditors.

(50) *Doe* d. *Blacksell* and others v. *Tomkins et ux.* 11 East, 185. And see *Goodtitle* d. *Faulkner* and others v. *Morse*, 3 T. R. 365. (which case affords much information on the doctrine of estoppel, as applicable to freehold tenure, and on the diversity between a release, a feoffment, and a warranty.) Vide

But the reversioner, and vested remainder-man are in the seisin and may surrender (51); and although a copyholder who has leased by license of the lord, is not strictly speaking a reversioner, yet his copyhold interest may pass in a surrender by the name of a reversion (52).

A remainder-man entering upon the tenant for life, does not thereby acquire any customary estate, whereof to make a surrender; but the person ousted is in all cases the tenant, and he or his heir may surrender, and not the person who has obtained wrongful possession (53), and

also *Doe* & *Prestwidge*, 4 Mau. & Sel. 178. *Doe* d. *Ibbott* v. *Cowling et ux.* 6 T.R. 63. *Taylor* v. *Philips*, 1 Ves. 229, 230.

(51) *Butler* & *Lightfoot*, 3 Leo. 239; 4 ib. 9. *Heggor* & *Felston*, 4 Leo. 111. *Gyppyn* v. *Bunney*, Cro. Eliz. 504. S.C. (*Tiping* v. *Bunning*) Mo. 465. *Colchin* v. *Colchin*, Cro. Eliz. 662. *Auncelme* v. *Auncelme*, Cro. Jac. 31. *Bullen* & *Grant*, Cro. Eliz. 148. S. C. 1 Leo. 175. *Church* v. *Mundy*, 12 Ves. 426, 431. Co. Litt. 266. b. N. (1).

(52) *Swinnerton* v. *Miller*, Hob. 177. S.C. Brownl. 178. But See *Selby* v. *Becke*, Litt. Rep. 17 *Saffyn's* case, 5 Co. 124. b. Cro. Eliz. 585.

(53) *Bird* & *Kirke*, 1 Mod. 199. S.C. Carter, 237. S.C. (called *Keen* v. *Kirby*,) 2 Mod. 32. 1 Watk. on Cop. 61. 2 ib. 146. But I apprehend that the person ousted, or his heir, must enter previous to making any surrender. *Joynder* v. *Lambert*, Cro. Jac. 36. *Norrice* v. *Norrice*, March, 23. *Selby* & *Becke*, Litt. Rep. 17. *Pit* v. *Moore*, T. Jones, 154. 1 Burr. 108. And see *Nalson* v. *Remington*, Clayt. 1. in which a copyholder of the King's who was put out of possession, during the ouster, made a surrender to I. S., who was lessor of the plaintiff, and it was held that nothing passed by the surrender, though there was no disseisin, the freehold being in the King, who could not be disseised; but that by the entry of the copyholder his estate was regained.

[N.B. The right of entry is

as such disseisor has no copyhold interest before admittance, he is not capable of a release from the rightful tenant, especially as such release would be prejudicial to the lord (54).

One joint tenant may release or surrender to another, which will operate as a severance of the joint-tenancy, and the releasee or surrenderee will be in by his companion, and not by the original grant (55); and the joint-tenancy will be destroyed even by a surrender to will (56); or to a stranger on condition to perform the will of the surrenderor (57), though such surrender is dormant and revocable.

A surrenderee of copyholds cannot surrender before admittance, even though the surrender to him is presented, nor will his admittance subsequent to his surrender, make such surrender valid by relation (58); for though any act of law

not tolled by a descent of copyholds, ante, p. 59. Neither is it necessary for a disseisee of copyholds to be admitted on entry, as he continues tenant. Co. Cop. s. 56. Tr. 129.]

(54) *Wakeford's* case, 1 Leo. 102. N. (2) to Co. Litt. 59. a. 4 Co. 25. b. *Mortimore's* case, Hetl. 150. Co. Cop. s. 36. Tr. 83.

(55) Kitch. 168. Co. Litt. 59. b. Co. Cop. s. 35. Tr. 79. *Wase* & *Pretty*, Win. 3. 4 Mod. 254. 2 D'Anv. 205. 1 New. Abr. 470. And see *Baddeley* v. *Leppingwell*, 2 Burr. 1543, Post, tit. 'Admittance *(Joint-tenant)*.'

(56) Post, tit. 'Surrender to Will.'

(57) *Gale* v. *Gale*, 2 Cox Ch. Ca. 136.

(58) Co. Cop. s. 39. Tr. 87. Supp. s. 4. Sty. 146. in *Barker* v. *Denham*. 2 Bl. Com. 368. *Rawlinson* v. *Green*, Poph. 127. S. C. 3 Bulst. 237, 240. *Wilson* v. *Weddell*, Yelv. 144. S. C. 1 Brownl. 143. Co. Litt. 60. a. n. (2). *Doe* d. *Tofield* v. *Tofield*, 11 East, 246; and see

will operate upon the estate, as in *Benson* & *Scott* (59), and other cases, where the admission has been held to have relation to the surrender, so as to make the estate pass in the same course of descent, and to give the same right to dower and curtesy, as if the admittance and surrender had been contemporaneous acts; yet it cannot be affected by any act of the party, according to the distinction in *Butler* & *Baker's* case (60).

And as a surrenderee has no interest before admittance, he is not capable of forfeiting the copyhold by committing felony or other act (61); but it is otherwise as to an heir, who is, to many purposes at least, tenant before admittance (62).

The above case of *Doe* & *Tofield* has decided (contrary to a prevailing notion (63),) that the steward's acceptance of a surrender from the first surrenderee, is not an admittance of him; and Lord Ellenborough there observed, that the authorities on that point in Co. Cop. s. 39. Yelv. 144. and Pop. 127. were not impeached by the passage in Roll. Abr. 505. X. pl. 1. or the note in Co. Litt. 60. a.; for it appeared, from Cro. Eliz. 504. and 662. that in *Keeping* & *Bun-*

Robinson v. *Greves*, Bridgm. Rep. 81. *Ford* v. *Hoskins*, Cro. Jac. 368. S. C. 2 Bulst. 336.

(59) Ubi sup.

(60) 3 Co. 29. a.

(61) *Roe* d. *Jefferies & al.* v. *Hicks & al.* 2 Wils. 13. And see Co. Cop. s. 59. Tr. 137.

(62) Ante, p. 140.

(63) *Elkin* v. *Wastall*, 3 Bulst. 232. 6 Vin. Cop. (E. b.) 1 vol. Watk. on Cop. 60-1. Ib. 101. Co. Litt. 60. a. n. (2). Gilb. Ten. 283.

ning, (called in Cro. *Gyppyn* & *Bunney*,) the first surrenderee was a remainder-man, and that the tenant for life had been admitted, and that *Colchin* v. *Colchin* was the case of an heir.

Of the Effect of a Surrender of Copyholds.

When a copyholder surrenders for a valuable consideration, the land is bound, both at law and in equity (64), and he is prevented from surrendering to any other person (65); but the whole legal estate remains in him (66), and he has a right to retain the possession subject to his accounting for the mesne profits, if the surrenderee is afterwards admitted (67), and if the sur-

(64) And the admission, as we shall see hereafter, is merely as between the lord and tenant: on these grounds it has been decided, that the admittance of the surrenderee need not be memorialized on a surrender of copyholds for securing an annuity. *Doe* d. *Naylor* v. *Stephens*, 1 Price Rep. 38.

(65) Kitch. 161. Co. Cop. s. 39. Tr. 87-8. *Roe* d. *Noden* v. *Griffiths*, 4 Burr. 1961. *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2785-7. *Holdfast* d. *Woolams* v. *Clapham*, 1 T. R. 601. *Benson* & *Scott*, 1 Salk. 185. S.C. 3 Lev. 385. S.C. Skin. 406. S. C. Holt, 160. S.C. Comb. 233. S.C. 4 Mod. 251. S.C. 12 Mod. 49. Cro. Car. 284.

(66) Kitch. 161. *Burgoyne* v. *Spurling*, Cro.Car. 273, 283. S.C. W. Jones, 306. *Baddeley* v. *Leppingwell*, 3 Burr. 1543. *Fisher* & *Wigg*, 1 P. W. 17. *Doe* d. *Shewen* v. *Wroot* and others, 5 East, 132. S. C. 1 Smith's Rep. 363.

(67) 2 Bl. Com. 368. Co. Cop. s. 39. Tr. 87. Gilb. Ten. 263. *Roe* d. *Jeffereys et al.* v. *Hicks et al.* 2 Wils. 13. *Burgoyne* v. *Spurling*, sup. *Berry* v. *Greene*, Cro. Eliz. 349. *Frosel* or *Rosewell* v. *Welsh*, Cro.

renderor die the estate devolves upon his customary heir (68); but he is a trustee for the surrenderee, and cannot set up an objection against his recovering in ejectment, on a demise laid between the time of the surrender and the admittance, even if the action is brought before admittance, for that relates back to the period of the surrender (69); but an action of trespass would be maintainable by the surrenderor, and not by the surrenderee (70).

A surrender is not affected by the death of the surrenderor (71), or of the person by whose hands the surrender is made, but presentment and admittance afterwards will be good; nor does the death of the surrenderee before presentment of the surrender, affect the right of the heir to be admitted (72).

So much of the copyholder's interest as is not

Jac. 403. S. C. 3 Bulst. 214. S. C. 1 Roll. Rep. 411. S. C. Godb. 268. *Arnold* v. *George*, Yelv. 16.

(68) *Burgoyne* & *Spurling*, *Frosel* & *Welsh*, *Doe* & *Wroot*, ubi sup. *Doe* d. *Vernon* v. *Vernon et al.* 7 East, 8.

(69) See *Benson* & *Scott*, *Holdfast* & *Clapham*, and *Vaughan* & *Atkins*, ante p. 153. *Doe* d. *Bennington* v. *Hall*, 16 East, 208.

(70) *Berry* v. *Greene*, Cro. Eliz. 349. But if the surrenderee is in possession, trespass would be maintainable by him, I apprehend, and not by the surrenderor.

(71) But a custom requiring the surrenderee to be admitted in the lifetime of the surrenderor, would be good. *Fenn* d. *Richards* v. *Marriott*, Willes, 430. Ante, p. 30.

(72) *Bunting* v. *Lepingwel*, 4 Co. 29. b. *Kite* & *Queinton*, 4 Co. 25. a. Co. Cop. s. 46. Tr. 89. *Vaughan* & *Atkins*; *Frosel* & *Welsh*, sup.

expressed in the surrender, or in the limitations by his will, pursuant to a surrender to the uses thereof, will remain in him of his old estate, and be considered as his reversion (73): therefore after a surrender by a copyholder to the uses of his will, he may surrender to any person he pleases (74); and on a surrender to such uses as the lord shall appoint, if the lord appoints the use to I. S. for life, the fee (subject to the life interest of I. S.) will result to the surrenderor (75).

The heir, as I have before shewn (76), will take by descent and not by purchase, when the two estates meet in him; and the ultimate limitation to the right heirs of the copyholder, under a surrender to uses, is within this rule, whether or not the copyholder takes a particular estate by the surrender (77); though it has been thought,

(73) *Bunting* v. *Lepingwel*, 4 Co. 29. b. *Bullen* & *Grant*, Cro. Eliz. 148. S.C. 1 Leo. 174. *Pedger's case*, 9 Co. 107. a. *Fitch* v. *Hockley*, Cro. Eliz. 441. S. C. 4 Co. 23. a. *Brown* v. *Dyer*, Holt, 165. S.C. 11 Mod. 98. *Thrustout* d. *Gower* v. *Cunningham*, 2 Sir W. Bl. 1046. *Roe* d. *Noden* v. *Griffits et al.* 4 Burr. 1952. *Bicknall* v. *Tucker*, Brownl. 181. Vin. Abr. Cop. (S. a.) pl. 16. *Shepherd* v. *Adams*, or *Belfield* & *Adams*, or *Southcot* & *Adams*, ante, p. 139.

(74) *Fitch* & *Hockley*, *Thrustout* & *Cunningham*, sup. Post, tit. 'Surrender to Will.'

(75) *Wrot's* case, Litt. Rep. 26.

(76) Ante, p. 55.

(77) *Roe* & *Griffits*, sup. *Smith* v. *Trigg*, 1 Stra. 487. *Godbold* v. *Freestone*, 3 Lev. 406. *Abbot* v. *Burton*, 1 Salk. 590. *Harris v. Bishop of Lincoln*, 2 P.W. 138. Gilb. Ten.

that if the surrenderor did not take a particular estate, the fee would not result to him, but that his heir would be in by purchase (78). Indeed a distinction of that nature once existed with respect to freehold estates (79), but it was long since abolished, and both in freehold and copyhold cases, the ultimate limitation to the right heirs of the grantor, or surrenderor, is considered as part of his old estate, and vested in him as a reversionary interest (80); the rule being that a man cannot limit an estate to his right heirs as purchasers (81).

Where a surrender is perfect in the beginning, a memorandum which would make the whole void will be rejected, as if the memorandum be, that the surrender is not to be in force till after the death of the surrenderor (82): this is precisely the principle of the decision in *Carter* & *Madgwick* (83), that when in a freehold case, the ha-

272. Fearne, C. R. 86 to 95. And to defeat the title of the customary heir, it must be distinctly shewn that the ultimate remainder passed out of the surrenderor. *Roe* & *Griffits*, ante p. 155.

(78) *Allen* & *Palmer*, 1 Leo. 101; and see *Roe* d. *Nightingale et ux.* v. *Quartley*, 1 T. R. 634. *Counden* v. *Clerke*, Hob. 31. Dy. 134. a. pl. 7.

(79) Dy. 134. a. Hob. 31. 1 Watk. on Cop. 97-8.

(80) *Harris* v. *Bishop of Lincoln*, 2 P. W. 138. And see *Godbolt* & *Freestone*, *Abbot* & *Burton*, ante p. 155. See also *Fenwick* v. *Mitforth*, Mo. 284. Fearne, C. R. 66-7.

(81) 32 H. 8. Br. Garde, 93. Co. Litt. 22. b.

(82) *Seagood* v. *Hone et ux.* Cro. Car. 367. S. C. Sir W. Jones, 342. 5 Mod. 267. in *Leigh* v. *Brace*. Post, tit. 'Surrender in futuro.'

(83) 3 Lev. 339.

bendum is repugnant to an express estate limited by the premises, the habendum shall be void.

And a limitation that is good in its nature, will be supported, although others are void (84).

Where the limitation of the use is void, the surrender to the lord will be deemed void also (85).

But it would seem that if a surrender is made generally into the lord's hands, without any circumstances explanatory of a contrary intention, the surrender will operate as an extinguishment of the copyholder's interest (86).

Yet we shall presently see that this maxim admits of an exception, as an estate may be implied from the admittance, when the surrender is made to the lord in such unqualified terms.

If, however, any estate is limited by the surrender, the admittance, in whatever manner it may be made, will not vary or qualify the uses of the surrender; this, indeed, is a necessary consequence of the rule, that a surrenderee is in by the surrenderor, and not by the lord (87).

(84) *Webster* v. *Allen,* Mo. 677. pl. 922.

(85) *Simpson's* case, Godb. 265. pl. 364. *Bambridge* v. *Whitton,* Mar. 177. cited Supp. Co. Cop. s. 1. Tr. 144. But see Mo. 352 in *Portman* & *Willis.*

(86) Co. Cop. s. 35. Tr. 80. Gilb. Ten. 254. Ib. (N. 117.) *Fisher* v. *Wigg,* 1 P. W. 17. S. C. 1 Ld. Raym. 627. S. C. 12 Mod. 296. 1 Watk. on Cop. 92, 109.; but see 1 Roll. Rep. 253. Com. Dig. Cop. (F. 8.)

(87) Co. Cop. s. 41. Tr. 91. *Taverner* & *Cromwell,* 4 Co. 27. b. *Westwick* v. *Wyer,* 4 Co. 28. b. *Bunting* v. *Lepingwell,* 4 Co. 29. b. *Bullock* & *Dibler,* Popli. 39. 3 Burr.

Suppose, therefore, a surrender to be made to A. without any condition, and the lord admits A. upon a condition, the condition will be void; or if it is to A. for life, either expressly, or for want of any words of limitation, and the lord admits in fee, a life interest only is acquired by A. under such surrender and admittance (88).

So any variance in the person, as well as in the estate, between the admittance and the surrender, is equally within the same rule; if therefore the surrender is to I. S., and the lord admits

1543. 4 Burr. 1961. 5 Burr. 2786. 3 Leo. 210. ca. 274. *Paulter* v. *Cornhill*, Cro. Eliz. 361. *Fitch* v. *Hockley*, Cro. Eliz. 442. S.C. 4 Co. 23. a. *Lane* v. *Pannel*, 1 Roll. Rep. 238, 317, 438. *Hether* & *Bowman*, Sty. 462. Co. Litt. 59. b. but it has been said, that a surrenderee, when admitted, is in by grant from the lord. *King* v. *Lord*, Cro. Car. 204. S.C. W. Jones, 229. 1 P.W. 17. Lord Raym. 627. 2 Ves. 257. 1 Roll. Abr. 627. Dise I. pl. 9, in *Moore's* case, and see Yelv. 223, in *Brasier* v. *Beale*. S.C. 1 Brownl. 149. This, however, is clearly erroneous, as to a surrender by a copyholder of inheritance. *Bird* & *Kirke*, 1 Mod. 200; and I incline to think, that there is no distinction in this respect as to a surrender by a copyholder for life only, unless the surrender is to the lord, absolutely, to the intent that he may regrant; and even then qu. and see 2 Keb. 823 in *Grantham* v. *Peebles* & *Copley*; S.C. 2 Saund. 422. but see *Bullock* & *Dibler*, Poph. 39. ["Where a bill is brought for surrender of a copyhold estate *held for lives*, the lord must be made a party, because when the surrender is made, *the estate is in the lord*, and he is under no obligation to new grant it; contra in cases of copyholds of inheritance, for there the lord need not be a party. Mich. Vac. 1720 in Canc." See 6 Vin. Cop. (X. e.) pl. 5.]

(88) Kitch. 171. Co. Cop. s. 41. Tr. 93. *Bunting* v. *Lepingwell*, 4 Co. 29. b.

I. S. and I. N., no estate is acquired by I. N. under this admittance, but the whole vests in I. S. (89).

And an admittance by the lord which is wholly at variance with the surrender, will be void; as if the surrender is to I. S., and the lord admits I. N.; and in such a case I. S. might afterwards be admitted according to the effect of the surrender: Again, if the surrender is to A. with the reservation of a rent, and the lord admits A. without any reservation of rent, or upon the reservation of a less rent than is mentioned in the surrender, this admittance will be wholly void (90).

It may be right to observe, in conclusion of our considerations of the effect of a copyhold surrender, that it has been decided that a fraudulent surrender of copyholds, is not an act of bankruptcy (91).

(89) Co. Cop. s. 41. Tr. 92. *Westwick* v. *Wyer*, 4 Co. 28. b. And see 3 Leo. 210. ca. 274.

(90) Co. Cop. s. 41. Tr. 93. 3 Burr. 1543. *Allen* & *Nash*, 1 Brownl. 127. *Hether* & *Bowman*, Sty. 462. It was said by Glin, C. J. in *Blunt* & *Clark*, 2 Sid. 61, that if a surrender be to the use of I. S., and I. N. is admitted, *and I. S. consents*, this is a good admittance. Sed qu. and see 6 Vin. Cop. (F. b.) pl. 16. A copyholder may surrender to the use of another, reserving rent, with condition of re-entry for non payment, and may accordingly re-enter on default being made. Lex Cust. 127, cites 4 H. 6. 11. 21 H. 6. 37. But see Mo. 352 in *Portman* & *Willis*.

(91) Exparte *Cockshott*, 3 Bro. Ch. R. 505. Cooke's Bpt. Laws, 99, 149. And see *Mathews* v. *Feaver*, 1 Cox Ch.

Of the Construction of Copyhold Surrenders.

Surrenders of copyholds, it has been often, and, as I conceive, correctly observed, are governed by the same rules as common law assurances (92); and conformable to this maxim, upon a limitation to the ancestor for life, and a further limitation in the same surrender to his right heirs, the two estates will unite, as in *Shelley's* case (93).

It must, however, be recollected, that when an estate for life is limited to the father or mother *only*, and the subsequent limitation is to the heirs of *both their bodies*, the latter limitation is a contingent remainder to the heirs, as well in copyhold as in freehold cases (94).

Ca. 278. *Hassells* and another v. *Simpson*, Doug. 89. n. 1 Montagu's Bpt. Laws, 36.

(92) *Fisher* v. *Nicholls*, 3 Salk. 100. S. C. Holt, 163. *Idle* v. *Coke*, 2 Salk. 620. S. C. 2 Lord Raym. 1144. S. C. 1 P. W. 70. S. C. 11 Mod. 57. S. C. Holt, 164. *Fisher* v. *Wigg*, 1 Ld. Ray. 630. S. C. 1 Salk. 391. 3 Salk. 206. S. C. Comy. 88. S. C. Holt, 369. S. C. 1 P. W. 14. S. C. 12 Mod. 296. *Sutton* v. *Stone* and others, 2 Atk. 101. *Lovell* v. *Lovell*, 3 Atk. 11. *Allen* v. *Patshall*, Godb. 137. *Seagood* v. *Hone*, Cro. Car. 366. S. C. W. Jones, 342. 1 Saund. 151. in *Wade* v. *Bache*. *Wright* d. *Burrill* v. *Kemp*, 3 T. R. 473. Gilb. Ten. 268 et seq. Lilly's Pr. Reg. 2nd part, 389. Post, 'Uses in futuro,' and 'Fee upon a fee.'

(93) 1 Co. 93. b. And see *Allen* v. *Palmer*, 1 Leo, 101. Fearne's Cont. Rem. 283.

(94) *Lane* v. *Pannel*, 1 Roll. Rep. 238, 317, 438. *Frogmorton* d. *Robinson* v. *Wharrey*, 3 Wils. 125, 144. S. C. 2 Sir W. Bl. 728. 3 Leo. 4. ca. 10. Fearne's Cont. Rem. 85-6, 458.

Again, a surrender to A. B. in general terms, without words of limitation, or to A. B. in fee simple, or to A. B. for ever, would create a life interest only (95), as an estate cannot arise by implication in a surrender, any more than in a deed at common law (96), with, perhaps, this exception, namely, that when no estate is mentioned in the surrender, it may be implied from the admittance (97), a surrender of copy-

(95) Co. Cop. s. 49. Secus if the estate is surrendered to the use of the will of the surrenderor, and he by his will devises the land to A. for ever. *Allen* v. *Patshall,* Godb. 137. 1 Hughes Abr. 455.

(96) *Allen & Nash,* 1 Brownl. 127. *Seagood* v. *Hone* et ux. Cro. Car. 367. S. C. W. Jones, 342. Gilb. Ten. 259. 1 Watk. on Cop. 115. But an estate may arise by implication in a conveyance to uses as well as in a will. *Pibus* & *Mitford,* 1 Vent. 372. 1 Cru. Dig. 442.

(97) Kitch. 169. *Brown* v. *Foster,* Cro. Eliz. 392. *Brooks* v. *Brooks* & *Wright,* Cro. Jac. 434. S. C. Poph. 126. 2 Roll. Abr. 67. Grants (K) pl. 18. Watk. on Cop. 109, 113. Gilb. Ten. 254-5. But I have very great doubts whether, in the absence of any special custom, a fee could be implied from the admittance, when the surrender is made by the copyholder to the use of another in general terms, or so as to create a life interest only: And I am inclined to think that the implication which the law allows from the admittance, is confined to a surrender made generally into the lord's hands, and which admittance is deemed sufficient to rebut the presumption of an intention to extinguish the copyhold interest, vide Co. Cop. s. 41. Tr. 93. ante p. 157.

Mr. Watkins was of opinion that a copyhold might be surrendered by implication, for which [1 Vol. on Cop. p. 58.] he cites Gilb. Ten. 254, who says "Copyholder in fee comes into court, and there accepts a copy to himself for life, remainder to his wife for life, remainder to his son for life;

holds allowing of an averment in cases of incertainty, when not opposed by any settled principle of law; and clearly also with this qualification, viz. that by custom a surrender, in whatever form, may create a fee, or any less estate (98).

Having shewn that the strict rules which regulate the construction of limitations in deeds of conveyance of freehold property, are applicable to copyholds, I propose, (previously to a discussion of the question whether surrenders of copyholds are, as a general principle, governed by the same rules as common law assurances,) to enter upon a brief consideration of the instances of exception to which I have just adverted; and—

First, as to an averment in cases of incertainty in the description of the surrenderee.

A surrender, it is said, will be good although the surrenderee is not accurately described, and an uncertainty in a surrender may be helped by averment, but when it is so very general and uncertain, as not to disclose the intention, it will necessarily be deemed void (99). Lord Coke

this is tantamount to a surrender to the use of himself, &c. but he hath his old reversion in him." The authority for this is *Belfield* & *Adams*, 3 Bulst. 80. S. C. (*Southcot* & *Adams*,) 1 Roll. Rep. 256. But see S. C. (called *Shephard* & *Adams*) 2 D'Anv. 183. (L) pl. 1. and 1 Roll. Abr. 501, where it was said to be no surrender, ante p. 139.

(98) Kitch. 201. *Thettenwell* v. *Bunney* cited in *Warne* & *Sawyer*, 1 Roll. Rep 48; and see *Brown* v. *Foster*, Cro. Eliz. 392.

(99) 5 Co. 68. b. *Cob* v. *Betterson*, Cro. Jac. 374. 6 Vin.

tells us (100), that it is not necessary upon surrenders of copyholds, that the name of the party to whose use the surrender is made, be precisely set down; but that if by any manner of circumstance the grantee may be certainly known, it is sufficient. And therefore that a surrender made to the lord archbishop of Canterbury, or the lord mayor of London, or the high sheriff of Norfolk, without mentioning either their christian name or surname, is good enough, and certain enough, because they are certainly known by this name, without farther addition. So, he adds, (101), if I surrender to the use of the next of my blood, to the use of my wife, to the use of my brother or sister, having but one brother or sister, these surrenders are good without any additions, because the grantee may certainly be known by these words: Again, if I surrender to the use of my son W. having more sons than one of that name; yet by an averment this incertainty may be helped (102).

But that if I surrender to the use of my cousin, or my friend, this is so general, and so incertain, that no subsequent manifestation of my intention

Cop. (K. a) pl. 5. marg. Gilb. Ten. 263. Calth. Read. 31. 1 Watk. on Cop. 107-8. ante p. 119.

(100) Co. Cop. s. 35. Tr. 80.

(101) Ib. and see *Cob* v. *Beterson*, sup. Kitch. 161.

(102) See contra, *Winkmore's* case, 29 Eliz. cited in *Cob* & *Beterson*, sup.; but in some cases parol evidence will be received to explain even a deed. *Harding* v. *Suffolk*, 1 Ch. Rep. 138. 3 Wils. 276. 1 T. R. 301. 4 Cru. Dig. 303. et seq.

can any way strengthen it:—And if three surrender to the use of three or four of St. Dunstan's parish, not naming the parishioners, this surrender is utterly void. So if I surrender in the disjunctive, to the use of J. L. or J. N. this is insufficient for the incertainty (103).

It may here also be proper to notice the case of *Roe* d. *Hucknall* & *others* v. *Foster* (104), which was a surrender by I. L. of a copyhold in his own occupation, to the use of J. L. and I. L. his son, for their lives, and the life of the survivor, remainder to the heirs of the body of the said I. L. son of J. L., remainder to the right heirs of *the said* I. L.; and the Court held, that it vested the remainder in fee by construction, in the heirs of I. L. the surrenderor, and not in I. L. the son of J. L.

And secondly, with regard to the influence of particular customs over copyhold surrenders, we find, that in the case of *Bunting* v. *Lepingwell* (105) it was adjudged, that the words '*sibi* et *suis*,' or '*sibi* et *signatis*,' or the like, may by custom create an inheritance.

And in many manors the words '*sequels in right*,' are substituted for the word '*heirs*.'

In the manor of Inkberrow, in Worcestershire, the grant is to '*him and his*,' which by the custom creates an estate for the term of the life of the copyholder, and the life of any wife he may leave

(103) Co. Cop. s. 35. Tr. 81.
(104) 9 East, 405.
(105) 4 Co. 29. b. and see Winch. 1. Anon.

at his death, and the life of his eldest son; and, for want of a son, his eldest daughter living at the decease of the survivor of the copyholder and his wife, and twelve calendar months after the death of such eldest son or daughter, (usually denominated the dead man's year:) And in that manor there are also copyholds for lives; [and see 1 Leo. 56].

There are also many manors in which the grant is made to several; and by the custom, the first person named takes the whole for his life, and so every one in succession (106).

In noticing the exceptions to the rule that copyhold surrenders are to be construed in the same manner as conveyances at common law, it will be proper to mention, that a surrender of copyholds is not allowed to work a wrong (107), but shall pass only such estate as the surrenderor may lawfully convey; therefore should A. a copyholder for his life, with remainder over to another, surrender to B. for the life of B., it will operate as a surrender only for the life of A. even if a custom can be shewn in favour of such a surrender (108);

(106) *Fisher* & *Wigg*, 1 Lord Raym. 627, 1 P.W. 17; and see 2 Vern. 264. ante (n. 98), but the *cestui que vies* in a grant of copyholds do not take beneficially, without a special custom, ante p. 119.

(107) Ante p. 59, 60. Dy. 264, a. *Roswell's* case.

(108) Mo. 8. ca. 27. Gilb. Ten. 257, 451-3. N. And see Co. Cop. s. 34. Tr. 76. vide also Anon. 2 Freem. 118. *Portman* v. *Willis*, Cro. Eliz. 386. S. C. Mo. 352. 1 Watk. on Cop. 98-9. In *King* v. *Lord*, Cro. Car. 204. S. C. (called *King* & *Loder*,) W. Jones, 229, upon a surrender by a copyholder for life to the use of another generally, though the lord granted to the surrenderee for his life,

and if the lord were to admit B. for his own life, it could only be good as a fresh grant (109); but it has been decided that if a person is admitted upon a mistaken claim, no new title being in contemplation of the parties, such admission shall not operate as a new and substantive grant from the lord (110).

I shall now proceed to a discussion of the position, that surrenders of copyholds are governed by the same principles as common law assurances; and in the first place, no little respect is due to the abundant *dicta* in affirmance of the rule, even supposing that any one or more cases, where a limitation of estate was alone the subject of consideration, and no special custom existed, had created an exception to it.

The case of *Fisher* & *Wigg* (111), has been

yet it was held, that the estate of the first copyholder was determined by the surrender, and that he had no reversion. 6 Vin. Cop. (P. 5.) pl. 3. And see *More* v. *Pitt*, 1 Freem. 245-6, ante, p. 157. n. 87. It should indeed seem, that a surrender by a copyholder for life to the use of another generally, where the custom warrants only estates for lives, is but changing the life. *Kerby* or *Kirk's* case, 1 Freem. 192. S. C. (called *Bird* & *Kirke*,) 1 Mod. 200.

(109) Gilb. Ten. 452-3. N. 120.

(110) *Zouch* & *Forse*, 7 East. 186.; and see *Right* d. *Dean* & *Ch. of Wells* v. *Bawden* & *others*, 3 East. 260. Post, at the end of tit. 'Admittance.'

(111) 1 P. W. 14. 1 Lord Raym. 622. 1 Salk. 391. 3 Salk. 206. Holt, 369. 1 Comy. 88. 12 Mod. 296. 1 Eq. Ca. Abr. 291. And see *Wade* v. *Bache*, Sid. 360. 2 Keb. 341, 1 Saund. 149, Lex. Man. 179. Ib. Appendix, pl. 35. by which case it

supposed to have fully established this exception, if not to have wholly denied the existence of the rule in question: the case was as follows. A copyholder in fee had issue four sons, and two daughters, and surrendered his copyhold to the use of his wife for life, and after her death, to the use of his three younger sons and two daughters, *equally to be divided*, and their *respective* heirs and assigns for ever. The question was, whether the sons and daughters took as tenants in common or as joint tenants. Gould J. was in favour of a tenancy in common. He observed, that in the construction of deeds this rule was to be attended to, viz. to make all parts of them take effect, according to the intent of the parties, so as it be not contrary to the rules of law, and that it would not be inconsistent with any rule of law, to construe this a tenancy in common; the words upon which the court were to judge, being *not words of limitation or creation of an estate, but of qualification and correction.* That no precise words were requisite to make a tenancy in common, and that the words 'equally to be divided' applied to the quality of the estate, and not to the limitation of it. That the intention of the surrenderor was to make a provision for his younger children and their heirs; which would not take

should seem, that a surrender by a copyholder in remainder in fee, to the use of the immediate tenant for life, for his life, with remainder over, is void only as to the limitation for life. And compare this with *Cholmley's* case, 2 Co. 50, *Milborne* v. *Dashburne.* Cro. Eliz. 323, and *Lofield's* case, 10 Co. 107.

effect, if it were a joint estate. That surrenders of copyhold land to uses ought to have the same favourable construction as wills, and were *not* to be tied up to the strict rules of common law, but should be expounded according to the intention of the party. That as to the intention of the party, the words in a deed were capable of the same construction as in a will. That the words 'equally to be divided,' made a tenancy in common in a will, beyond dispute; and that the present was the case of an use, which had the like construction as a will. That in *Smith* v. *Johnson Pasch*, 32 Car. 2. B.R. a feoffment was made to two and their heirs, equally to be divided, and there Scroggs and Dolben were of opinion that the feoffees were tenants in common, and not joint tenants, but Jones differed.

In the present case Turton J. agreed with Mr. J. Gould; but Holt C. J. contra, observed, that copyhold lands did not differ in construction of law from freehold lands, and that surrenders of copyholds were governed by the same rules as conveyances at common law. That the opinion in Poph. 126, which his brothers relied on, viz. that a surrender was to be construed as a will, was of no authority; for it was amongst the additional cases, and not reported by Popham; and that there was no mention made of it in the report of the same case in Cro. Jac. 434. That by the surrender the sons and daughters were joint-tenants, for the words 'equally to be divided,' signified no more than the law would have implied without them, and

therefore they could have no operation. 1 Inst. 186. a. That the word *equally* did not alter the manner of taking the profits, there being no difference in that respect between joint-tenants and tenants in common. That there was a difference between wills and conveyances at law, and that words in the one should have a different construction from what they would have in the other. That it was after some time and debate, that the words 'equally to be divided' obtained to make a tenancy in common; and that the doubt proceeded from those words *not making a tenancy in common at common law*, for if they had, there could then have been no doubt upon a will. That it had been the constant opinion both at the bar and on the bench, *that those words would not make a tenancy in common in a deed.* That nobody was satisfied with the judgment in the case of *Smith* & *Johnson*, and afterwards the rule for judgment was discharged, and an '*ulterius concil*' awarded, and then the party died; so that no judgment was given.

The court, however, in the principal case decided in favour of a tenancy in common (112).

The above case of *Fisher* & *Wigg* must certainly be considered as a settled authority for

(112) Note. In *Pibus* & *Mitford*, 1 Vent. 376, Twisden J. said, "A deed differs greatly from a will, for if a man surrenders copyhold land to two, equally to be divided, they are joint-tenants; but such a devise would have made them tenants in common." Note also, it has been said that the decision in *Fisher* & *Wigg* was afterwards reversed. See *Stringer* v. *Philipps*, M. 1730. 1 Eq. Ca. Abr. 291; but this would seem to be an error. Vide 1 P. W. 97. (n. 1.) 1 Wils. 341.

construing the words 'equally to be divided,' as a tenancy in common, in a surrender of copyholds, equally as in a will; and it is as clearly settled, that the same words will make a tenancy in common, in a conveyance deriving its effect from the statute of uses (113).

I am not aware of any case in which the effect of those words in a common law deed, has been judicially considered, since the courts have ceased to favour the construction of a joint-tenancy, except the above case of *Smith* & *Johnson*, in which the point was not fully decided; but should it be held at any future period, that those words are not to have the same operation in a common law conveyance, as in a conveyance to uses, (a distinction which certainly appears to have prevailed formerly, see Sty. 211, in *Hurd* & *Lenthall*, 1 P. W. 20. Cro. Eliz. 695, in *Lewen* v. *Cox*, 1 Salk. 390, in *Ward* v. *Everard*,) then indeed, but not till then, I shall be ready to admit, either that the case of *Fisher* & *Wigg* was wrongly decided, or that it has impugned the rule we are now discussing.

It does, however, appear to me, that the case of *Fisher* & *Wigg* was rightly decided, though some of the observations of the judges who decided it, are at variance with the principle upon which my opinion is founded, namely, that

(113) Anon. 2 Vent. 365. 1 Lord Raym. 626. *Goodtitle* d. *Hood* v. *Stokes*, 1 Wils. 341. S.C. Sayer, 67; and see *Denn* d. *Gaskin* v. *Gaskin*, Cowp. 660. *Rigden* v. *Valier*, 2 Ves. 252. *Stratton* v. *Best*, 2 Bro. Ch. Rep. 237-9.

there is no distinction between a conveyance at common law, and a conveyance under the statute of uses, nor between a conveyance of the one description or the other, and a surrender of copyholds, either as to strict words of limitation, or in giving effect to an evident intention, but that the same latitude of construction is admissible in either form of assurance; and as the words 'equally to be divided,' are not words of limitation, but of modification or qualification only, and are held in a will to shew an intention of creating a tenancy in common, so they are to have that effect in every description of conveyance, whether of freehold or copyhold property.

Since the case of *Rigden* & *Valier* (114), all idea of a different rule of construction between a surrender of copyholds, and a conveyance to uses, or deed of covenant to stand seised, has been completely abolished.—That case was as follows: G. E. by deed-poll, in consideration of natural love and affection to his wife and children, did give, grant, and confirm, to his two daughters, all the rents and profits of two messuages and certain lands during the life of his wife, equally to be divided between them, paying £5. per annum to his wife; and after the decease of his wife, his two daughters to have the same messuages and lands to them and their heirs for ever, equally to be divided between

(114) 2 Ves. 252, Belt's Supp. 335. S. C. 3 Atk. 731. ante (n. 113). and see 2 Keb. 341 in *Wade* v. *Balch* [or *Bache*].

them.—The wife survived the husband, and afterwards died; then one of the daughters died, leaving children, who filed this bill as co-heirs of their mother, tenant in common with her sister under the above settlement and disposition, for an account of the rents and profits of a moiety of the estate, for a partition, and to have certain deeds and writings produced and secured. The question was, whether the two daughters of G. E. took as joint-tenants, or as tenants in common. Lord Hardwicke, in deciding in favour of a tenancy in common, observed, that there was no solemn determination that the words, "equally to be divided," would not make a tenancy in common in a deed, though it had been said over and over again that those words were sufficient in a will, but not in a deed. That the case of *Fisher* & *Wigg*, which was relied on as a judgment of B. R. that those words in a surrender of copyholds would make a tenancy in common, had been objected to as a doubtful authority, and was said to have been reversed. That on search he (Lord Hardwicke) could not find it to be so, or that a writ of error was brought, (115). That another case was cited, which passed as an authority by the judges in that case, viz. 2 Vent. 365, which, if rightly reported, was in point. That he had caused the register's books to be searched, and could not find any decree entered to warrant the report; but that it was cited by Gould J. and

(115) Ante, p. 169.

it was taken that there was such a case; and that it might be so, though not entered, for the parties frequently acquiesced, and there was often ground to proceed no farther. That there was another authority (such as it was) of *Smith* & *Johnson;* which if rightly stated, was on feoffment, and was not disputed by Holt. That no one had more reverence for the opinion of Holt Ch. J. than he had, yet he thought the arguments of the other judges more founded on the nature and reason of the thing, and that Gould's argument had great weight, and was not to him (Lord Hardwicke) satisfactorily answered. That the case was indeed on a surrender of copyhold lands in the *lord's court;* and the judges who argued to make it a tenancy in common, held, that such a surrender was not to be construed in the strictness of the thing, but like a will. That Holt contended, it was to be construed as a deed, and that in one thing he was certainly right, viz. that a surrender of copyhold lands to uses was not to be considered on the foot of a use or trust, for they were not within the statute of uses; therefore such surrender was only a direction to the lord whom to admit, and when admitted the surrenderee was in by grant of the lord, not of the surrenderor (116); so that it was of a particular nature, not as a use or trust on the statute. But that the arguments of the judges, if of weight in that case, held full as strong in a covenant to stand seised, as that

(116) But see ante, p. 157.

(though he was not quite sure whether it was meant as a deed or a will) would be construed; the use till the event happened remaining in the grantor, being sufficient to support the uses declared in the deed. That it was objected, that there was no warrant to construe a deed to uses, as to the limitations and words of it, in a greater latitude than a conveyance by way of feoffment, or other conveyance at common law, and if construed in a different manner would cause great confusion; which his lordship held to be true in general, for the statute joining the estate and the use together, it became one entire conveyance by force of the statute, and the words were to be construed the same way, but that this was to be taken with some restriction. That as to the words of limitation in a deed, they were to be sure to be construed in that manner, viz. in the same sense; but that where they were words of regulation or modification of the estate, as the words *equally to be divided* were, and not words of limitation, he (Lord Hardwicke) thought there was no harm in giving them greater latitude in deeds on the statute of uses, which were trusts at common law, than on feoffments, which were strict conveyances at common law. His lordship's opinion therefore was, that the plaintiffs were entitled to have a decree for the division of the estate, and a decree was made accordingly.

In the case of *Denn* d. *Gaskin* v. *Gaskin* (117), which arose out of a devise of a freehold mes-

(117) Cowp. 660.

suage to three persons *equally*, and in which the court of B. R. held that the devisees took an estate for life, *as tenants in common*, Lord Mansfield said that the word *equally* as well as the words *equally to be divided* implied a division, whereas if the devisees were to take as joint tenants, there would be no division. That he remembered arguing a case before Lord Hardwicke in support of the opinion of Mr. Justice Gould in P. W. 14, and against the opinion of Lord Holt; and there Lord Hardwicke thought with Mr. Justice Gould. That it was certainly the better opinion, more liberal, and better founded in law. And Mr. Justice Aston, following Lord Mansfield, observed, that the words 'equally to be divided' had been determined to be a tenancy in common in a *deed*. The court, in this last case, did not even hint at any distinction between a conveyance to uses, and a feoffment at common law in the effect of the words "equally to be divided."

And in *Tapner* d. *Peckham* & *others* v. *Merlott* & *Prior* (118) the Court of Common Pleas held

(118) Willes, 177. And see 3 T. R. 765, in *Doe* & *Morgan*, where Lord Kenyon said, that soon after the statute of uses an attempt was made to introduce a different construction on deeds to uses from that which was put on common law conveyances, but that the attempt failed of success, and that the same rule of construction applied to both. Vide also 2 Barnew. & Ald. 130, in *Doe* d. *Littledale* v. *Smeddle* et al. and 2 Lord Raym. 1151, in *Idle* v. *Cooke*. But see 1 Ves. 167, (n. f.) in *Stones* v. *Heurtly*. 1 P. W. 14. (n. 1.) in *Fisher* & *Wigg*. and 2 Bro. Ch. Rep. 237-8, in *Stratton* & *Best*.

most distinctly, that there were no good grounds for construing a conveyance to uses in a different manner from other conveyances. In that case upon a trial in ejectment for the manor of Keynor, in Sussex, one of the questions reserved for the opinion of the Court was, what estate J. F. took under a settlement whereby the premises were limited by Sir T. M. on the marriage of his daughter E. M. with J. F. to the use of himself and his heirs until the marriage, afterwards to the use of J. F. and his assigns *for* 99 *years*, if he should so long live, sans waste, then to trustees during his life to preserve contingent remainders, and after his death to the use of E. M. for her life for her jointure, remainder to the first and every other son of the marriage [successively] in tail general, remainder to every after born son [successively] in tail general, remainder to the first and every other daughter of the marriage [successively] in tail general, remainder to every after born daughter [successively in tail general], and for default of such issue, to the use and behoof of the *heirs and assigns of the said J. F. for ever.*

The marriage took effect, and J. F. entered and was in possession during his life, and died without issue born in his lifetime or after his death. His wife afterwards entered and died seised. J. F. by his will devised his estates generally to his uncle I. M. in fee, who survived J. F. and devised to his son and heir J. M., the defendant, in fee, his reversionary estate called

Keynor Farm. I. M. died before E. M., and upon her death J. M. entered and levied a fine. The lessors of the plaintiff were the heirs at law of J. F. No evidence was given at the trial of an actual entry to avoid the fine. Lord C. J. Willes, after stating that the court were all clearly against the plaintiff on this latter point, observed, as to the principal question, that J. F. had only an estate for 99 years in him at the time of the devise to I. M. (Co. Litt. 319.) That if J. F. had had a life estate he would have taken a fee-simple because of the ultimate remainder limited to his heirs.

That this general rule seemed to be agreed on all sides, but two answers were endeavoured to be given to it; 1st, that the word *assigns* plainly shewed that it was intended that the inheritance should vest in J. F.; 2dly, that this being a conveyance made by way of use, must be construed in a different manner from a conveyance of a legal estate, and that, as in a will, the words must be construed according to the intent of the parties. And after expressing an inclination of opinion that the word *assigns*, though it did not alter the estate of J. F., yet it might give him a power of disposing of the premises by will, Lord C. J. Willes thus concludes: "As to what was "insisted upon that a conveyance to uses is to "be construed as a will and in a different manner "from other conveyances, we are all clearly of a "contrary opinion. For since the statute of "uses an use is turned into a legal estate to all

" intents and purposes; it must be conveyed " exactly in the same manner and by the same " words; and if it were otherwise, as most con- " veyances are now made by the way of use, " endless confusion would ensue. A case indeed " was cited, and much relied on, to establish " this doctrine. That was the case of *Leigh* v. " *Brace*, reported in *Carthew* 343, and 5 *Mod.* " 266, (a); in the first book said to have been " adjudged in B. R. Hil. 6 W. and in the last " M. 8 W. The words of that deed were thus; " an estate was vested in trustees in fee to the " use of the grantor for life, then to the use of " Thomas Brace his son and his heirs, and for " default of issue of the body of the said Thomas " Brace then to the use of the heirs of the grantor. " The special verdict is set forth in 5 *Mod.*, and " I have compared it with a copy of the record " which has been brought to me; and in that " case the court did certainly determine that " Thomas Brace the son took only an estate tail; " but in 5 *Mod.*, where the case is more largely " and more particularly reported than in *Carthew*, " there is not one word said of any difference " between a conveyance by way of use and any " other conveyance: But the resolution (appear- " ing there) is founded upon other determinations " in respect to legal conveyances; as the case in " Co. Litt. 21. a, where it is held that if a man " make a feoffment to another and his heirs, ha- " bendum to him and the heirs of his body, he

" shall have an estate tail; and a case out of the " 37 Lib. Ass. 15, long before the statute of uses, " was cited for that purpose. Another case was " cited from 19 Hen. 6. 74., that if a feoffment be " made to a man and his heirs, and if he die " without heirs of his body, remainder over, this " is an estate tail. They considered therefore " the words in this deed as one sentence, and " the latter as explanatory of the former. And " they cited likewise *Beck's* case, reported in " Litt. 344, where a feoffment was made to the " first son and his heirs, and for default of such " issue remainder over. But the court, as ap- " pears by the report in *5 Mod.*, said not one " word about the statute of uses, but said they " would consider it just in the same manner as " if a gift were made to a man and his heirs, " viz., to the heirs of his body. It is indeed said " in *Carthew*, where the case is very shortly re- " ported, that the court laid a great stress upon " its being a conveyance by way of use, which " conveyances they said had been always con- " strued as wills, and that they were not tied up " to the strict forms of conveyances at common " law, and that it was so adjudged on the same " deed in B. C. on a special verdict. I own that " *Carthew* is in general a very good and a very " faithful reporter; but I fancy he was mistaken " here, because I cannot think that the court would " give so absurd a reason for their judgment, " especially since there is not a word said of it

" in 5 *Mod.*, where the case and the arguments " upon it are very particularly reported. How- " ever if this had been as *Carthew* reports, yet it " is a single case, it is contrary to reason and " common experience, and such a determination " would make such a confusion in all the pro- " perty of the people of this kingdom, that I own " I should have no regard to it, but think that " the contrary ought to be declared to be the " law."

Indeed it is quite clear that the intention will prevail in all cases, as well in deeds and surrenders, as in wills, unless the limitation be contrary to any settled rule of law; so the word " or" may be read " and" in order to give effect to an evident intention, *Wright* d. *Burrill* v. *Kemp*(119): In that case a surrender was made by A. to himself for life, remainder to his wife for her widowhood, and upon her marriage after his death, to her son W. for life; and after the decease of W. to the issue of his body, provided that if W. should die in the lifetime of the surrenderor, *or* without issue, the estate should go to the right heirs of the surrenderor: A. the surrenderor survived his wife, and W. also died in the lifetime of A. leaving issue; and the court held that the issue were well intitled to the estate, but avoided giving any opinion as to the

(119) 3 T. R. 470. Vide also *Sowell* v. *Garret*, Mo. 422. *Price* & *Hunt*, Pollexf. 645. *Barker* v. *Suretees*, 2 Str. 1175. *Framlingham* v. *Brand*, 3 Atk. 390. *Doe* & *Smeddle*, 2 Barnew. & Ald. 126.

extent of their interest under the above limitation. Lord Kenyon there observed, that there was no doubt but that a surrender was considered as a common law conveyance, and was not intitled to the same favourable construction as a will (120); and that in deeds certain legal phrases must be used, in order to create certain estates, as heirs to create a fee, and heirs of the body to create an estate tail; but beyond that he would say with Lord Hardwicke that there was no magic in particular words further than as they shew the intention of the parties. That in order to give effect to the intention of the surrenderor, the court must say, that when he used the word *or*, he meant *and*. And that there was no case in which any difference had been made as to the point in question between a will and a deed, when the court were considering how the intention of the parties could be effected (121).

(120) In *Smithson* v. *Cage*, Cro. Jac. 526, the court of B. R. held, that lands appertaining to a messuage, did not pass by a surrender of the messuage cum pertinentiis, but only the house with the curtilages, and that there was no distinction in this respect between a copyhold and freehold. And see *Archer* & *Bennett*, 1 Lev. 131. Fisher on Cop. 153. sed vide the distinction in the case of a devise, *Doe* d. *Lempriere* v. *Martin*, 2 Sir W. Bl. 1148. Vide also *Blackhall* v. *Thursby*, Het. 2. 6 Vin. Cop. (S. a.) pl. 21.

(121) And see *Windham's* case, 5 Co. 7. 2 Bro. Ch. R. 237. *Idle* v. *Cooke*, ubi sup. 2 Comy. 540. The following Note I have found in the margin [Sec. 50. p. 143.] of a valuable interleaved copy of Lord Coke's Copyholder, published in 1650; which book appears to have been in the

It is a general rule of construction, both in freehold and copyhold cases, that where there is a sufficient certainty before, by way of description of the thing granted or surrendered, as by giving to a close a particular name, &c. there a subsequent mistake, as in the tenants name, or in the number of acres or rent, shall not injure the grant or surrender; but that where a *particular* description is added to a *general* one, it shall restrain the general words. So where a copyholder surrendered 'all his copyhold cottage, *with a croft adjoining*, &c. *all which premises were then in his own possession*,' to the uses of his will, and devised to his wife 'all his copyhold *cottage and premises then in his own possession*,' for her life, and the surrenderor, at the date of

possession of Mr. Mauritius Johnson, of the Inner Temple, in 1713, by whom, probably, the note was made. "It was "agreed by the court in the "case of *Holmes* & *Meynel* "(Mich. 33 Car. 2. B.R. then "a trial at bar) obiter, that if "a copyhold be surrendered to "the use of two sons in tail, "and that if one die without "issue, the other shall be his "heir, and if both die without "issue, then to the use of ano-"ther in fee, and afterwards "one of them dies without "issue, the survivor shall have "the entirety. N.B. Justice "Dolbin shewed a case, stiled "*Johnson* & *Smart*'s case, in "a very fair MS. being a sur-"render of copyhold lands in "the manor of Lourington, "much to this purpose. And "whereas Rolle in his Abr. "(2 Abr. fo. 416.) tit. Remain-"der, hath such a case under "such names, as on a devise by "will; the court agreed that "the case in Rolls Abr. was "erroneously taken, and that "the true case was according "to Dolbin's MS."

the surrender and of his will, only in fact occupied the cottage and garden behind it; it was held, that the croft passed; the description of all the premises as in the possession of the copyholder, being a mere mistake, and the words both in the surrender and will, being sufficient to comprise the croft (122).

And in *Roe* d. *Conolly* v. *Vernon* & *Vyse* (123), where A., seised of customary tenements, some held at fines certain and others at fines arbitrary, or, as they are termed in the manor, customary tenements *compounded* and *uncompounded*, surrendered out of court, 'all his messuages, &c., which he held by copy of court roll, being of the yearly rent to the lord, of 4*l.* 10*s.* 8½*d.* *and compounded for*,' (which rent exceeded the amount payable for the compounded tenements;) and by his will devised his copyhold messuages in Middlesex, and all his *freehold* manors, messuages, &c. in Great Britain, to uses under which the lessor of the plaintiff claimed, and by a residuary clause, devised all other his manors, &c. either freehold or copyhold, on an event which happened, to his three daughters and their heirs, equally as tenants in common; the question reserved for the opinion of the court was, whether the *uncompounded* tenements passed to the lessor of the plaintiff by the devise of all *freehold* ma-

(122) *Goodright* d. *Lamb* v. *Pears*, 11 East, 58.

(123) 5 East, 51; and see *Gascoigne and others* v. *Barker*, 3 Atk. 9. *Wilson* v. *Mount*, 3 Ves. 193.

nors, &c. or by implication from the whole of the will; or whether they passed to the daughters by the residuary devise; and the court held that the words '*and compounded for*,' operated by way of restriction, and confined the surrender to that description of copyholds; and that the words '*yearly value, &c.*' did not qualify the restriction: It was also adjudged, that the testator used the word '*freehold*,' as referrible only to what were, according to common understanding, freehold lands, and that the lands in question, which were generally reputed copyholds, passed to the daughters by the residuary devise.

And a general description both in the surrender and admission may be qualified by the established usage of the manor. So in *Stammers* v. *Dixon* (124) it was held, that although the terms of the surrenders and admissions were sufficiently comprehensive to pass the *soil*, yet that by received usage, the grants might be restrained to, and only pass, the *fore crop*.

We are now to consider whether an estate to commence *in futuro*, or a *fee upon a fee*, can be limited in a *surrender* of copyholds, as in a conveyance to uses since the statute 27 Hen. 8, or

(124) 7 East, 200. And one person may have the *prima tonsura* as copyhold, and another may have the soil, and every other beneficial enjoyment as freehold. Ib. See also ante, p. 123.

as in a will, or as in the case of trust estates; and if the opinion of those gentlemen who advocate the affirmative of the position (125), be correct, then indeed we should have to acknowledge a still further exception to the rule, that a surrender of copyholds is to receive the same construction as a conveyance at common law; or rather I should be disposed to consider the concession, as an unqualified denial of the rule altogether: but it does appear to me that the contrary opinion, and which I believe to be the more general one (126), is supported both by principle and authority.

FIRST *of an Estate to commence* IN FUTURO.

An examination of the cases bearing on the point under consideration, and as nearly as possible in chronological order, may best serve to lead us to a right conclusion.

Clampe's case, in replevin, as reported by Croke (127) was this. The defendant avowed

(125) In a question on which a judicial authority is so anxiously looked for, it cannot be stated too early, that the opinion of the late Mr. Fearne was somewhat favourable to limitations of this nature, in surrenders of copyholds. See his Treatise on Cont. Rem. p. 416-17; and that Mr. Sanders has expressed a very decided opinion in favour of such limitations in a recent tract entitled, 'Surrenders of Copyhold Property considered, with reference to future and springing uses.'

(126) Mr. Watkins concurred in the opinion entertained by the author. See 1 Vol. Watk. on Copyholds, p. 197 et seq.

(127) Cro. Eliz. 29. This case is thus shortly reported in

for damage feasant in the land, being copyhold and parcel of the manor of C. and of the nature of Borough English, and demised to J. B. and Margaret his wife and their heirs, by copy of court rolls, by the name of a *Mese*, containing 12 acres of land, and that J. B. died, and said Margaret married J. Clampe, and they had issue the plaintiff, their eldest son, and the avowant their youngest son; that afterwards Margaret died seised and the land descended to the avowant, as youngest son and heir by the custom, who entered and took the cattle damage feasant. The plaintiff by replication confessed the above premises, but said that J. Clampe and Margaret surrendered said land *per nomen* of the reversion after the death of said J. C. and M. to the use of the plaintiff and his heirs, who was admitted accordingly; and that M. died and J. C. did survive; that afterwards J. C. died, and the plaintiff entered *absque hoc*, that the said land did descend to the defendant, as *puisne* son, &c. And upon this replication, it was demurred in law. Coke for the avowant prayed judgment. First, for the matter in law, the plaintiff's plea was not sufficient; for he pleaded a surrender of the land by the name of *a reversion* (128), after the death of

4 Leo. 8. "A copyholder in "possession surrendered the "reversion of his land *post* "*mortem suam* to the lord to "an use, &c. It was adjudged, "that thereby nothing passed."

(128) See *Drewell's* case cited per Harvey J. in *Selby* & *Beck*, Litt. Rep. 18, which he states to be this: A feme copyholder in fee came to the court and offered to surrender to J. S.

the baron and feme; and by that pretence, there would be a particular estate left in the feme, and also in the baron; whereas the baron had nothing before, which could not be, for the surrender was void. *For when one is seised in fee, he cannot by any matter in fact give away the inheritance after his death, and so leave a particular estate in himself;* but peradventure it might be done by matter of record, and of that opinion was the court, 38 H. 6. 8 H. 7. And it was absurd that by a mere grant, the baron should have an estate for life, who had nothing before. Secondly, he said, there was an apparent fault in the pleading, for the avowant pleaded that Margaret died seised, and the land descended to him, and the plaintiff in his replication traversed the descent, and not the dying seised, 14 H. 8. 23. At the end of the Term the avowant had judgment. The reporter adds a note, that it was moved that the 12 acres could not pass by the name of a *mese*, but that the court gave no regard to it.

The case of *Allen* & *Nash*(129) is thus reported by Brownl. Special verdict in ejectment upon surrender of copyhold land, to the use of the second son for life, after the death of the tenant and his

and his heirs, but she desired to retain an estate for life to herself; and the steward entered, that she surrendered the *reversion* of her copyhold to J. S. after her death; and it was adjudged a bad grant, because there was not any reversion.

(129) Hil. 5 Jac. C. B. Brownl. 127.

heirs, and it was adjudged not to be good in a surrender; for though it be good in a will, yet implication is not good in a surrender, and in copyhold cases a surrender *to the use, &c.* this is no use but an explanation how the land shall go.

But the report of *Allen* & *Nash* in Noy (130) is as follows. In ejectment it was resolved, that if a copyholder surrenders according to the custom to the use of N. after the death of the surrenderor, that is good, notwithstanding that one cannot preserve the same estate to himself, *for the estate is in the lord;* and the surrenderor during his life shall take the profits, and afterwards the lord ought to admit B. [N.], according to the direction of the said surrender.

In *Dunnal* v. *Giles* (131), which was the case of a devise of a term of years to one for life, with remainder over to another, and which was held to be a good devise, it is said "If a man hath a "rent *in esse*, you cannot grant that in reversion "after your death; but if I surrender to the use "of one after my decease, [this] is not good, by "his [the] opinion of *Warburton* & *Daniel*."

The case of *Simpson* & *Sothern*, or *Southwood*,

(130) P. 152, and see *Bentley* v. *Delamor*, 1 Freem. 268, where it is said, "A surrender in futuro is good; *and* "*the mischief* for the freehold "remains in the lord." Mr. Sanders in his tract on Surrenders says, "Some words are "here omitted. The meaning "manifestly is, that the mischief "of future limitations, in com- "mon law conveyances, does "not apply to copyholds, the "freehold in the latter case "remaining in the lord."

(131) Brownl. 41.

B. R. 13 Jac. as reported by Godbolt (132) was this. R. S. a copyholder in fee, *jacens in extremis*, made a surrender of his copyhold, Habendum [à tempore mortis of the surrenderor] to his child in ventre sa mere, and his heirs, and if such child died before his full age or marriage, then to J. S. and his heirs. The child was born and died within two months, upon which J. S. was admitted; and a woman, as heir general to the devisor and to the infant, was also admitted, and entered into the land, against whom J. S. brought trespass; and it was adjudged against the plaintiff. Two points were resolved in this case. 1st, *That a surrender cannot begin at a day to come*, no more than a livery, as it was adjudged 23 Eliz. in that court in *Clark's* [qu. *Clamp's*] case. 2dly, That the remainder to J. S. could not be good, because it was to commence upon a condition precedent, which was never performed: And therefore the surrender into the hands of the lord was void, for the lord doth not take but as an instrument to convey the same to another. And it was therefore said, that if a copyholder in fee doth surrender unto the use of himself and his heirs, because that the limitation of the use is void to him who had it before, the surrender to the lord is void (133).

According to the report of this case in Cro. Jac. (134), the resolutions of the court were as

(132) P. 264, and there called *Simpson's* case.

(133) Ante, p. 157.

(134) P. 376, and there called *Sympson* & *Sothern*. And see S. C. (called *Simpson* &

follows. 1st, That a surrender Habendum after death to the use of another and his heirs, is merely void, for a copyholder in fee cannot surrender habendum after his death, no more than a tenant in fee can convey his lands, habendum after his death, for then he should leave a particular estate in himself, which is against the rules of

Southwood), 1 Roll. Rep. 109, 137, 253. 2 Roll. Abr. 791, 794-5. See also S.C. 2 Bulst. 272, where the judgment of the court is stated to have been thus expressed. "Here in this principal "case the surrender is not good; "it is like unto an attornment: "if the one or the other dies "before attornment, it will not "then be good, for there ought "to be a perfection of the thing "in the life of the parties; "here in this case, the very "foundation of all is bad; here "it is to an infant in ventre sa "mere; this is not good by an "immediate surrender."

The above case of *Simpson* & *Sothern* is cited from 2 Bulst. 274, in Lex Cust. p. 128, where it is added, "this case falls upon a rule in law, that one cannot pass a copyhold estate to begin from a day to come, nor yet upon a contingency, no more than a freehold at common law." And see Mr. Watkins' observations on this case, 1 vol. on Cop. 203 et seq. vide also Belt's Supp. to Ves. Sen. p. 119, in *Taylor* v. *Philips*.

Lord Chief Baron Gilbert, (Ten. 260), observes, "If a surrender be to the use of J.S. *habendum* after the death of the surrenderor for life, this is a void surrender, being but one entire limitation; but if the surrender were to him generally, *habend.* after the death of J.R. quære, if the *habend.* be void or not?" the meaning of which clearly is, that where an estate is expressed in the habendum, and no estate is limited by the premises, then if the limitation by the *habendum* is void, the whole is void; but when an estate is well limited by the premises, the habendum if repugnant is void, but the previous limitation remains good. Ante, p. 156-7, and see *Hogg* & *Cross*, Cro. Eliz. 254. Post, tit. '*Fee upon a Fee.*'

law: And there is not any difference betwixt a copyhold and freehold, as to that purpose. Coke cited *Clamp's* case, that such a surrender was void. 2dly, That the surrender to the use of J. S. and his heirs, if it happens that his child in ventre sa mere die within age, is merely void; for he cannot make such a conditional surrender to operate in future; judgment for the defendant.

Hellsworth's case is thus reported by Clayton (135). A copyholder had made a surrender in fee of his copyhold in possession, after his death, and it was holden good by custom of the manor, which was Wakefield; *otherwise it is by the common law.*

In *Seagood* & *Hone*, (136) a copyholder surrendered to the use of F. R. and J. his son and the longest liver of them, and for want of issue of J. R. the lands to remain to the younger son of Mary Seagood; *the surrender not to stand and be in full force until after the death of the surrenderor.* The first question was upon this latter clause, viz. whether the surrender were good, and that clause void. It was resolved that the surrender was good, and that clause (being repugnant to the premises) should be rejected as void and idle. The second question was, whether J. R. took an estate for life only, or an estate to him and the heirs of his body; and it was resolved that he had but an estate for life, and

(135) P. 21.

(136) Cro. Car. 367. S. C. W. Jones, 342, ante, p. 156-7.

no higher estate by implication, for although it might be enlarged by implication in a devise, yet it should not be so in a surrender or conveyance.

The case of *Barker* & *Taylor*, B. R. 10 Car. in ejectment (137) was as follows: Two coparceners copyholders in possession, the one surrendered his *reversion* in the moiety after his death; Cur. The surrender is void, and the same is all one, as well in the case of copyhold, as of freehold: so was it adjudged 26 Eliz. in *Plat's* case; and so also was it adjudged in this court, 3 Car. in *Simpson's* case.

Bambridge v. *Whitton* & *Wife*, Hil. 17 Car. B.R. in ejectment, is thus reported by March (138). Upon *not guilty* pleaded a special verdict was found, and the case was this: A copyhold tenant in fee doth surrender into the hands of two tenants, unto the use of J. W. immediately after his death, and whether it be a good surrender or no, was the question. *Harris:* that the surrender is void. Estates of copyholds ought to be directed by the rule of law, as is said in 4 Rep. 22. b. 9 Rep. 79. & 4 Rep. 30. And as in a grant, a grant to one in *ventre sa mere* is void, so also in a will or devise, and as it is resolved in *Dyer*, 303, p. 50. So it hath been adjudged that the surrender to the use of an infant in ventre sa mere is void: And as at common law a freehold cannot begin *in futuro*, so neither a copyhold, for so the surrenderor should have a particular estate in

(137) Godb. 451. (138) P. 177, ca. 236.

him without a donor or lessor, which by the rule of law cannot be: and he took a difference betwixt a devise by will, and a grant executed; in a devise it may be good, but not in a grant executed: and here he took a difference where the grant is by one entire clause or sentence, and where it is by several clauses, 32 E. 1. Taile, 21. Dyer, 272. p. 30. Com. 520. b. 3 Rep. 10. *Dowtie's* case, and 2 Rep. *Doddington's* case. For instance, he would put only the case in Dyer and the comment. A termor grants his term *habendum* after his death, there the *habendum* only is void, and the grant good; but if he grant his term after his death, there the whole grant is void, because it is but one sentence: So he said, in this case, because it is but one clause, the whole grant is void. Another difference (he added) is, where the distinct clause is repugnant and where not; where it is repugnant there it is void, and the grant good, *quia utile per inutile non vitiatur*. But in this case, it is one entire sentence; M. 13. or 23 Jac. in this court, Rot. 679. *Sympson* & *Southwell's* case, the very case with the principal one. There was a surrender of a copy-tenant to the use of an infant in *ventre sa mere* after the death of the surrenderor, and there it was resolved by all the Judges except *Dodderidge*, that the surrender was void; First, because it was to the use of an infant in *ventre sa mere*, and Secondly, *because it was to begin in futuro*, which is contrary to the rule in law: And copy-tenants, as it was there

said, ought to be guided by the rules of law: but *Dodderidge* doubted of it, and he agreed the case at common law, that a freehold could not commence *in futuro*, but he doubted of a copyhold; and he put the case of surrender to the use of a will: But he said that judgment was afterwards given by *Coke* Chief Justice, in the name of all the other Judges, that the surrender was void, and therefore *Quod querens nihil capiat per billam*, wherefore he concluded that the surrender was void, and prayed the judgment of the court.

It is scarcely necessary, I submit, to do more than to state the above authorities, in order to satisfy the reader, that there is every reason to suppose, that, whenever the point now under our consideration shall call for a decision, it will be ruled, that an estate *in futuro* cannot be created in a surrender of copyholds, any more than in a conveyance of freeholds at common law.

It may, however, be proper to remark, as far as the report by Noy of the case of *Allen* & *Nash* is unfavourable to this conclusion, that no importance can be attached to an authority so very loosely worded as that is, particularly when the very same case is differently reported in another book, and evidently in a way much more to be relied upon. The supposed decision in Noy is also rendered very questionable by the reason given for it, namely, that *the estate is in the*

lord (139). The freehold interest certainly is in the lord, but we have already seen, that no estate passes to him by a surrender in which any use is declared (140); and though the freehold interest in the lord, is capable of supporting a contingent remainder in copyholds, as we shall see hereafter, yet that peculiar quality of the lord's reversionary estate, cannot be urged as a reasonable ground for any distinction between freeholds and copyholds, in the effect of a limitation in futuro.

It is true that so much of the copyholder's interest as is not disposed of by a surrender, remains in him of his old estate, and therefore the reason greatly relied upon in support of the maxim, that an estate in futuro cannot be limited of a freehold at common law, namely, that if allowed a vacancy would be created in the tenure, certainly does not apply to copyholds; but it is to be recollected, that the admittance of a surrenderee has relation to the date of the surrender, and it would therefore be very inconsistent, even on a principle of tenure, to sanction a limitation which must of necessity presuppose a continuing estate in the surrenderor; and, with

(139) Vide also the case of *Bentley* & *Delamor*, 1 Freem. 268, ante, p. 188; in which the same maxim is stated as favourable to a limitation in futuro, but in so vague a way as to be of little or no authority. And see Lex. Cust. p. 117, where in citing *Bambridge* and *Whitton* (ubi sup.), that a copyholder cannot surrender an estate to another, and leave a particular estate in himself, it is added, "therefore Noy, p. 152 is not law."

(140) Ante, p. 157.

reference to the original nature of a copyholder's interest, it would be equally inconsistent to invest him with the power of creating an estate, which could not be limited by a person possessing a freehold interest; and even allowing all possible weight to the above distinction, in principle, between freehold and copyhold assurances, still as there ought to be some fixed standard for the guidance of the courts, in the construction of limitations in copyhold surrenders, and as there is no perfect accordance between a surrender of copyholds, and a conveyance of freeholds, either before or since the statute of uses, it surely is not reasonable to urge the absence of the probable grounds of a decision in a freehold case, as the necessary inducement of a contrary decision in a copyhold case, and in contravention of the very general, if not uniform, practice of adhering, in the construction of limitations in surrenders of copyhold property, to the rules applicable to common law assurances, especially as such practice is not attended with the least inconvenience; for it is observable, that all such springing and executory limitations and powers, as are frequently introduced into settlements of freehold property, may be created of copyholds through the medium of trusts, and which, should it be required, might be enforced in a court of equity.

I am aware that Lord Coke has said that "in customary grants upon surrenders the law is not so strict as in grants at the common law, for in

grants at the common law, if the grantee be not in *rerum naturâ*, and able to take by virtue of the grant presently upon the grant made, it is merely void: But in customary grants upon surrenders the law is otherwise: for though at the time of the surrender the grantee is not *in esse*, or not capable of a surrender; yet if he be *in esse* and capable at the time of the admittance, that is sufficient: and therefore if I surrender *to the use of him that shall be heir to J. S.*, or to the use of J. S's next child, or to the use of J. S's next wife; though at the time of the surrender J. S. had no heir, child, or wife, yet if afterwards he hath a child, or taketh a wife, his heir, his child, or his wife, may come into the court, and compel the lord to admit according to the surrender. So if I surrender to the use of him that shall come next into St. Paul's after such an hour: whose fortune soever it is to come first, the lord must admit him, and I shall never avoid it. The same law is, if I surrender to the use of him that J. S. shall nominate, or that I myself shall nominate to the lord at the next meeting. The reason of the law is this: A surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee before the lord hath admitted him according to the surrender; and therefore if at the time of the admittance the grantee be in *rerum naturâ*, and able to take, that will serve. Besides in customary grants the intent of the grantor is more respected than

it should be by the strict rules of the law: which appeareth by this, that if a surrender be made of a copyhold to the use of a last will, and the surrenderor deviseth it unto two, the one is admitted according to the purport of the will, this shall inure to both." (141)

Some of the above positions of Lord Coke are perfectly reconcileable with settled principles and authorities, as we shall see hereafter in discussing the subject of springing uses and powers, and it is clear that a devise of copyholds, though operating as an appointment of the use pursuant to the surrender, is not more fettered by the strict rules of limitation applicable to conveyances both of freehold and copyhold property, than a devise of freeholds, but the same latitude of construction is allowable in both instances.

It does not appear to me, however, that Lord Coke meant to contend, at least as a general rule, that a use in futuro could be created in an immediate surrender of copyholds; the direct contrary opinion, indeed, is manifested by the following conclusion of the section of his Copyholder, from which the above passages are cited, viz. "But "though the surrender be a thing executory and "the intent of the grantor so much favoured; yet "if a copyholder will surrender to the use of the "right heirs of J. S. he being alive, this is void, "because it cannot take effect according to the "intent of the grantor; for he would have the

(141) Co. Cop. s. 35. Tr. 81-2.

" grant to be executed presently, which cannot " be, in regard that J. S. can have no heir till " after his death." (142)

Secondly, *of a* Fee *upon a* Fee.

I propose now to examine the authorities for and against the position, that a *fee* may be limited on a *fee* in a *surrender* of copyholds, and I think it right to pursue the same plan, as in discussing the previous and nearly allied question, of a limitation commencing in futuro.

As the cases of *Brian* & *Cawsen* (143), and *Wellock* & *Hamond* (144), were both cases of devise, it would have appeared to me quite unnecessary to have taken any notice of them in this place, had they not been urged as authorities in favour of a limitation of a fee upon a fee, in a surrender of copyholds.

The former case was a devise of distinct property to three brothers, and if they lived till they were of age, and should have issue, then the property was devised to them respectively and their respective heirs; and the will contained a devise over to the other brothers or brother, in like manner, if either or any of them should die without issue.

The brothers were admitted according to the

(142) See further as to limitations in futuro, post, tit. 'Fee upon a Fee.'

(143) 3 Leo. 115.

(144) Cro. Eliz. 204. S. C. (called *Wellcoke* v. *Hammond*), cited 3 Co. 20. b.

intent of the will, and one of them died under age and without issue, whereupon the two surviving brothers were admitted to his part; one of those two came of age and had issue, and surrendered all his interest to the third brother and his heirs, who was admitted accordingly, and attained 21, and afterwards died without issue; and it was resolved, that no estate tail was created by the will, but that the fee simple vested in the devisees when they came of age and had issue, *so as the residue of the devise was void.*

In *Wellock* & *Hamond*, T. W. a copyholder in fee of land, of the nature of Borough English, having issue four sons and one daughter, (or, according to Lord Coke's statement of the case, three sons and one daughter,) surrendered to the use of his will, and devised to his wife for life, with remainder to J., his eldest son, *paying* 40*s.* to each of his brothers, and to his sister, within two years after the wife's death. The wife entered and died, and then J. entered, and omitted to pay the legacies within the two years, but paid them within five. The youngest son died without issue. J. surrendered to will, and devised to his wife, who on his death entered, and married the defendant. Then R., as youngest brother and *heir* entered; the defendant ousts him, and he brings trespass. The question was if the entry of R. were lawful. The court held, that the word '*paying*' was a limitation, and not a condition, for if it were a condition it was extin-

guished in the heir, and there was no remedy for the money, but being a limitation, the law would construe it, that upon the nonpayment of the money, his estate should cease, and then the law should carry it to the heir by the custom, without any limitation over. The court added, "*and in a "devise it may well be, that an estate in fee shall "cease in one and shall be transferred to another.*" Judgment for the plaintiff.

The case of *Paulter* v. *Cornhill and others*, is thus reported in Cro. Eliz. (145). It was moved whereas the surrender was to the use of one in fee, upon condition to pay £100 to a stranger, and that if he failed, it should be to the use of a stranger in fee; whether that were a good limitation to the stranger, so as there should be a fee dependant upon a fee. The court spake not much hereto, but willed to have it specially found; yet Beamond conceived it to be good enough, for it should be as an use limited upon a feoffment, and these uses should rise out of the first surrender.

In the *Lex Custumaria* (146) it is said, that a fee may be limited upon a fee, upon a collateral contingent in copyhold estates: As if a man surrender a copyhold in fee, to the use of J. S. and his heirs who is an infant, and if J. S. dies before the age of twenty-one years or marriage, then he surrenders this to the use of J. D. in fee. This is a good remainder to D. upon the contingent.

(145) P. 361. (146) P. 120, but see ib. 128.

The authority given for this is the case of *Simpson* & *Southwood*, 2 Roll. Abr. 791. M. 13 Jac. B.R. (Ante p. 190.)

The case of *Bentley* v. *Delamor* is reported by Freeman (147) thus. A copyholder surrendered to the lord, to the intent that the lord should admit A. whom he intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and A. in tail. The question was, whether the limitation of the estate upon the limitation of the fee precedent, were good or not. The cases cited were, Rolle, 263. 1 Leo. 288. 2 Cro. 376. Godb. 274. Per. tot. Cur. It is good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds. A surrender in futuro is good, and the mischief (148), for the freehold remains in the lord.

The case of *Edwards* v. *Hammond*, C. B. 35 Car. 2, is thus reported by Levinz (149). A copyholder of land, Borough English, surrenders to the use of himself for life, and after to the use of his eldest son and his heirs, if he live to the age of twenty one years; provided and upon condition that if he die before twenty-one, that then it shall remain to the surrenderor and his heirs.

(147) C. B. 1 Freem. 267-8, vide also *Roe* d. *Noden* v. *Griffits* & others, 4 Burr. 1952, where a copyholder surrendered to the use of himself his heirs and assigns till solemnization of his intended marriage, and then to the use of himself for life, &c. And see 2 W. Bl. Rep. 1046, in *Thrustout* & *Cunningham*.

(148) Ante, p. 188. (n. 130.)

(149) 3 Lev. 132.

The surrenderor died, the youngest son entered, and the eldest son being seventeen brought an ejectment; the sole question was, whether the *devise* to the eldest son be upon condition *precedent*, or if the condition be *subsequent?* Scil. that the estate in fee should vest immediately upon the death of the father, to be divested if he die before twenty-one. The court held, that though by the first words, this may seem to be a condition *precedent*, yet taking all the words together, this was not a condition precedent, but a present *devise* to the eldest son, subject to and defeasible by this condition *subsequent*, Scil. his not attaining the age of twenty-one: And they resembled this to the case of *Spring* & *Cæsar*, reported by Jones Just. and abridged by Roll. 1 Abr. 415. A fine to the use of B. and his heirs, if C. pay him not 20*s.* upon 10 Sept. and if C. does pay, to the use of B. for life, remainder to C. and his heirs, where the word *Si* does not create a condition precedent, but the estate in fee vests presently in B., to be divested by payment afterwards; so here.

Stocker & *Wife* v. *Edwards*, reported by Shower (150) appears to be the same case as *Edwards* & *Hammond* (151); but it is thus dif-

(150) 2 Sho. 398. ca. 365.

(151) The following note as to this case is given in *Bromfield* v. *Crowder*, 1 N.R. 324. "The record of the case of *Edwards* v. *Hammond* was searched for and produced by desire of the court, from which it appeared, that the premises in question were customary lands

ferently stated.—A surrender of a copyhold tenement was made to the use of himself [the surrenderor] for life, and after to the use of John his youngest son, *and the heirs of his body*, if he attain to the age of eighteen years, and if he die before he attain to that age without issue male, then to his [the surrenderor's] right heirs.

The question was, whether this was a *contingent remainder*, or whether it should attach immediately upon the death of tenant for life? And

held of the manor of *South Burstead*, in *Essex*, in which there was a custom that the youngest son should inherit, and that the widow of the tenant in fee should have her free bench; that *John Hammond* the elder surrendered the reversion of the premises in question, dependant on his mother's freebench, to the use of himself for life, and after his decease, to the use of *John Hammond* the younger, (his eldest son) "and his heirs and assigns for ever, if it shall happen that the aforesaid *John Hammond* the younger shall live until the aforesaid *John Hammond* attain the age of twenty and one years; provided always and under the condition nevertheless, that if it shall happen that the aforesaid *John Hammond* the younger shall die before he attain the age of twenty and one years," then to remain to the use of *John Hammond* the elder and his heirs; that the mother died in the lifetime of the surrenderor; that the surrenderor died leaving issue the said *John* the younger, his eldest son, and *Thomas* his youngest son; that *John Hammond* the younger was admitted according to the surrender; that the defendant *Ann Hammond*, was the widow of the youngest son, who entered on the death of his father, and that *John Hammond* the younger (the eldest son) being then fifteen, brought an ejectment against *Ann Hammond*, his brother's widow; that judgment was given for him upon special verdict in the Common Pleas, and afterwards a writ of error brought."

it was held, that it attached immediately, because of the intention of the party; and held to be the same with Sir *Julius Cæsar's* case, in Jones, 389.

The above authorities, I would submit, are far from favouring an opinion that the doctrine of springing, shifting, and executory uses, applies to a surrender of copyholds.

The case of *Brian* & *Cawsen* was wholly a question of devise, and furnishes no argument whatever in support of an analogy between limitations in a surrender of copyholds, and in a conveyance of freeholds since the statute of 27 Hen. 8. And the case of *Wellock* & *Hamond*, as far as it may be thought to bear on the present question, is an authority, that a fee upon a fee can be limited of copyhold property, by way of devise *only*.

In *Paulter* & *Cornhill*, the court, with the exception of Beamond J., carefully abstained from giving any opinion on the present point, and it does not appear that it was further urged, from which it may be concluded, that the parties were well satisfied, that the decision would have been against the analogy contended for.

With respect to the position in the Lex Custumaria, that a fee may be limited upon a fee on a collateral contingency in copyhold estates, I shall only observe, that as far as the position is intelligible, it is supported only by a single authority, and which is abridged by Rolle with a *dubitatur*, 2 vol. 791; and see ib. 794-5, where it is said to have been adjudged, that the ulterior

statute of 27 Hen. 8; and, as particular instances of such dissimilitude, notices the necessity of there being in every common law conveyance, both a grantor and grantee; and the rule, that in feoffments and grants, a party not named in the premises shall not take by the habendum; and also the notion, that the words '*equally to be divided*' would not create a tenancy in common in a common law deed.—Mr. Sanders then contends, that uses limited on a surrender of copyholds, are more to be assimilated to uses arising out of the seisin of a feoffee, under a feoffment since the stat. of Hen. 8., and, indeed, that there is no substantial distinction between them. He further urges, that the legal estate is not vested in the copyholder, but in the lord; and that the copyholder is tenant at will to the lord, with a *beneficial* interest co-extensive with the fee by custom only, and that the legal fee so vested in the lord, will support and give effect to future and springing uses of the copyhold interest.—Another point enforced by Mr. Sanders is, that powers of revocation and appointment of new uses are applicable to settlements of copyhold estates.—And from these premises that learned gentleman has drawn a conclusion, that future, springing, and executory uses, may be limited upon a surrender of copyholds, equally as in feoffments deriving their effect from the statute of uses.

I have already endeavoured to shew, that the greater weight of authority is in favour of a sur-

render being construed as a common law assurance, as far as there is any similarity between a surrender of copyholds, and a conveyance of freeholds, either before or since the statute of uses, subject however to the rule that the limitations in a surrender may, in some cases, be explained by the admittance, and to the further maxim, that words of limitation may be supplied by the custom of the manor. And this position, I submit, is far from being impugned by the argument, that in every common law deed there must be both a grantor and grantee; for it is quite clear that a surrender does not create a seisin in the lord to supply the uses declared; and although it is equally clear that nothing vests in the lord by the surrender, and that the surrenderee is in not by him, but by the surrenderor, yet, in contemplation of law, a surrenderee after admittance, is in upon a new grant from the lord (158); and it may therefore be urged that in every surrender of copyholds, there is ideally both a grantor and grantee, in exact similitude to a common law conveyance.

It is true that in a feoffment and grant at common law, a party not named in the premises could not take by the habendum; and it is generally supposed that in a surrender of copyholds, a party not named in the premises, may take under the habendum; but this distinction between a deed and a surrender, does not exist in a general

(158) See *Roe* & *Loveless*, 2 Barnew. & Ald. 456-7.

and unqualified sense. The surrender itself merely points out the person whom the lord is to admit, and the estate intended to be transferred to him by the surrenderor; the lord then grants seisin to the surrenderee, without any words of limitation, to hold to the surrenderee *and his heirs*, or for such other interest as is expressed in the surrender; and if the surrender does not distinctly describe either the person of the surrenderee, or the estate intended to be transferred to him, this, as we have before seen, may be explained by the act of admittance or grant, and which was the ground of the decision in *Brooks's* case (159).

And even in a conveyance at common law, a person might take by way of remainder, though not named in the premises (160).

It is also observable, that there is no real distinction between a feoffment or grant of freeholds at common law, and a *voluntary* grant of copyholds, when such grant is not controlled by any particular custom (161); but that under a voluntary grant of copyholds to A., habendum to A. and B., nothing will vest in B. (162).

In my observations on the case of *Fisher* & *Wigg* I have suggested, that the words 'equally

(159) See Sanders on Surreaders, p. 14. ante, p. 161.

(160) *Greenwood* v. *Tyler*, Cro. Jac. 563.

(161) See 1 Lord Raym. 627. *Downs* v. *Hopkins*, Cro. Eliz. 323. ante, p. 164-5.

(162) 2 Roll. Abr. 67. (K) pl. 19 to 23. *Windmore* v. *Hobart*, Hob. 313. *Greenwood* v. *Tyler*, Cro. Jac. 563. 1 Watk. on Cop. 113, 114.

to be divided,' would probably be held to create a tenancy in common, even in a common law conveyance, and if so, the supposed distinction, in the operation of such words, between a deed of that nature, and a conveyance deriving its effect under the statute of uses, does not assist the argument, that future and springing uses are applicable to an immediate surrender of copyholds.

With reference to Mr. Sanders's position that the legal estate is not vested in the copyholder, but in the lord, and that such estate in the lord will support future and springing uses of the copyhold interest, it is proper to remind the reader, that the legal customary fee is clearly in the copyholder, and that he may maintain ejectment (163), and have trespass against the lord himself, should he presume to disturb his possession (164); and even indict him (165).

(163) Post, tit. 'Admittance' and 'Action of Ejectment.'

(164) "Tenant by the custome is as well inheritour to "have his land according to the "custome, as he which hath a "freehold at the common law." Per Danby Ch. J. C. B. M. 7. E. 4. 19. "If tenant by custom paying his services be "ejected by the lord, he shall "have an action of trespass "against him." Per Brian Ch. J. C. B. H. 21. E. 4. 80. Co. Litt. 60. b. Co. Cop. s. 9. Gilb. Ten. 157, 329. 1 Watk. on Cop. 45. But this is only since copyholders ceased to be mere tenants at will.

The estate of a copyholder, prior to the period of its assuming that permanent quality, which time and custom have established, has been, and not inaptly, compared to a use of a freehold at common law. *Bacon* in his reading on the Statute of Uses, [p. 18.] says, "For the inception and progression of uses, "I have for a precedent in

(165) See p. 213.

It is also clear that the reversionary freehold interest in copyhold lands is vested in the lord

" them searched other laws, " because states and common- " wealths have common acci- " dents; and I find in the civil " law, that that which cometh " nearest in name to the use, is " nothing like in matter, which " is *usus fructus*: for *usus fruc-* " *tus & dominium* is with them, " as with us, particular tenancy " and inheritance. But that " which resembleth the use " most is *fidei commissio*, and " therefore you shall find in " *Justinian, lib.* 2. that they " had a form in testaments, to " give inheritance to one to the " use of another, *Hæredem con-* " *stituo Caium; rogo autem te,* " *Caie, ut hæreditatem restituas* " *Scio.* And the text of the " civilians saith, that for a great " time if the heir did not as he " was required, *cestuy que use* " had no remedy at all, until " about the time of Augustus " Cæsar there grew in custom " a flattering form of trust, for " they penned it thus: *Rogo te* " *per salutem Augusti*, or *per* " *fortunam Augusti, &c.* Where- " upon Augustus took the " breach of trust to sound in " derogation of himself, and " made a rescript to the *prætor* " to give remedy in such cases; " whereupon within the space " of a hundred years, these " trusts did spring and speed " so fast, as they were forced " to have a particular Chan- " cellor only for uses, who was " called *prætor fidei commis-* " *sariis*; and not long after, " the inconvenience of them " being found, they resorted " unto a remedy much like " unto this statute, for by two " decrees of senate, called *se-* " *natus-consultum Trebellianum* " *& Pegasianum*, they made " *cestuy que use* to be heir in " substance. I have sought " likewise, whether there be " any thing which maketh with " them in our law, and I find " that Periam, chief baron, in " the argument of *Chudleigh's* " case, compareth them to co- " pyholders, and aptly for many " respects.

" First, because as an use " seemeth to be an hereditament in the Court of Chan- " cery, so the copyhold seem- " eth to be an hereditament in " the lord's court.

" Secondly, this conceit of

distinct from the customary interest (166), and that such reversionary freehold intitles the lord

" limitation hath been trouble-
" some in copyholders as well
" as in uses; for it hath been
" of late days questioned, whe-
" ther there should be dowers,
" tenancies by the courtesy,
" intails, discontinuances, and
" recoveries of copyholds, in
" the nature of inheritances, at
" the common law; and still
" the judgments have weighed,
" that you must have particular
" customs in copyholds, as well
" as particular reasons of con-
" science in use, and the limi-
" tation rejected.

" And thirdly, because they
" both grew to strength and
" credit by degrees: for the
" copyholder first had no re-
" medy at all against the lord,
" and were as tenancy at will.
" Afterwards it grew to have
" remedy in chancery, and af-
" terwards against their lords
" by trespass at the common
" law; and now, lastly, the
" law is taken by some, that
" they have remedy by *ejec-*
" *tione firmæ*, with a special
" custom of leasing. So no
" doubt in uses: at the first
" the Chancery made question
" to give remedy, until uses
" grew more general, and the
" Chancery more eminent; and
" then they grew to have re-
" medy in conscience: but they
" could never obtain any man-
" ner of remedy at the com-
" mon law, neither against the
" feoffee, nor against strangers;
" but the remedy against the
" feoffee was left to the *sub-*
" *pœna*; and the remedy against
" strangers to the feoffee."

But as a use in a freehold case is by the statute of 27 Hen. 8. turned into a legal estate, so the use in a surrender of copyholds, since the estate of a copyholder became alienable and descendeth uncontrolled by the lord, is turned into a customary legal estate, under which a demise by a copyholder, though void against the lord, is good to maintain the declaration in ejectment.

(165) Gilb. Ten. 157, 329. 1 Watk. on Cop. 45. St. 21 Jac. c. 15. 1 Hawk. P. C. ch. 64. s. 15, 16, 17.

(166) But they are not distinct interests as to all purposes, for the possession of the copyholder is regarded as the lord's possession, and will cause a *possessio fratris* in him. Watk. on Desc. c. 1. s. 1. p. 51.

to enter in case of any forfeiture by the particular copyhold tenant(167); and this is the true reason why the lord's interest will support a contingent remainder, under a surrender of copyholds; but it does not by any means follow, that such freehold interest in the lord, should operate as a seisin, (analogous to the seisin of a feoffee to uses) to give effect, either to a springing use, or to a limitation in futuro, of the copyhold interest, when no prior use is created; for neither in the instance of a fee limited upon a fee, or of a limitation of the fee in futuro, could the lord enter, without being considered as a trespasser, except, indeed, for a forfeiture of the whole copyhold interest, which, so far from supporting the springing or future use, would of necessity defeat it altogether.

I cannot myself see any analogy between a conveyance to uses of freehold property, and a surrender of copyholds, with reference to the general doctrine of powers. It certainly is not to be denied that a power of appointment or nomination, to be executed either by deed or will, may be created by a copyhold surrender(168), and that such a power may be given to a wife,

(167) But it is to be recollected, that the lord could only retain possession during the continuance of the particular estate, and that such forfeiture would not affect the interest of the persons entitled in remainder.

(168) See *Beal & Shepherd*, Cro. Jac. 199. *Holder & Preston*, 2 Wils. 400.

and to be exercised in the lifetime of the husband (169); or even to a stranger (170). Indeed the legality of a power of appointment over copyholds, *even where the fee is limited in default of any exercise of the power*, has been recognized by the courts both of law and equity (171).

In *Doe* d. *Harman* v. *Morgan* (172), which was an ejectment tried before Mr. Justice Heath at the Assizes for Monmouth, a verdict was found for the plaintiff, subject to the opinion of the Court of B. R. on the following case. H. L. being seised in fee of the copyhold estate in question as heir ex parte materna, surrendered the same to the use of himself and his assigns for life, with remainder to the use of such persons, and for such estates, as he should by deed or will signed in the presence of three witnesses, direct, with remainder over, in default of appointment or devise, to his heirs and assigns according to the custom of the manor. H. L. subsequently at a Court Baron of the manor, surrendered the premises to the use of J. B., his customary heirs and assigns. At the foot of the surrender a memorandum was written, that such surrender was

(169) *Cook* v. *Layer*, 12 W. 623. *Drinan* & *Thompson*, 4 Taunt. 294; and see *Peacock* v. *Monk*, 2 Ves. 191. Belt's Supp. 323-4.

(170) *Wroe's* case, Litt. Rep. 26. Co. Cop. s. 33. Tr. 62.

(171) But I have considerable doubts, whether the lord is compellable to accept a surrender creating a power of appointment, to be executed by deed.

(172) 7 T. R. 103.

made for securing the repayment of £1000 and interest due from H. L. to J. B., and that after payment thereof, the premises were to revert to and follow the uses of the first abovementioned surrender; and J. B. was thereupon admitted tenant. Afterwards J. B. died, and the premises descended to his infant son and customary heir J. B. The mortgage money was paid by H. L. to the executor of J. B. the father. J. B. the infant appeared personally before the lord of the manor out of court, and was admitted tenant, and immediately afterwards, by virtue of an order of the Court of Chancery, surrendered to the use of the said H. L. his heirs and assigns, according to the custom of the manor, who at a subsequent court was admitted accordingly, and afterwards died intestate. S. H., one of the plaintiffs, was the paternal heir of H. L., and the defendant was his maternal heir. The question was, whether on the death of H. L. the premises descended to his maternal or paternal heir. The Counsel for the defendant observed, that the only ground on which he could rest the defendant's title was, that the legal estate remained in H. L. notwithstanding the surrender to J. B. the mortgagee, who had an equitable interest only. For at the time of such surrender, H. L. had only an estate for life, with a power of appointment by deed, or will attested by three witnesses; and no such appointment having been made, the legal estate was not divested from him by the sur-

render in fee to J. B. the father, unless it could operate upon the reversion in fee in default of appointment. The defendant, therefore, as heir ex parte maternâ, was entitled, according to the case of *Abbot* v. *Burton*, Salk. 590. Lord Kenyon, C. J. "If it were material to decide that point in this case, I should think, that an appointment by H. L. by deed would have been good, though not executed in the presence of three witnesses, and that that number of witnesses only applied to an appointment by will. But it is immaterial to consider that point here. The surrender in favour of J. B. the mortgagee was not merely of an equitable, but of the legal estate; J. B. was admitted in fee under it, and his heir at law surrendered to H. L. in fee. This then is like a feoffment and refeoffment (173), which, it has been long settled, breaks the line of descent; and consequently the lessor of the plaintiff who is the heir ex parte paternâ, is entitled to recover."

It is clear therefore that had H. L. made an appointment of the customary fee simple of the estate in question to a stranger, pursuant to the above power, such appointment would, in the opinion of Lord Kenyon, have displaced the fee limited in default of appointment, to the heirs of H. L.

The case of *Read. Buxton & Wife* v. *Dunn* (174), has been considered as an authority not only in

(173) Ante, p. 56. (174) 2 Wils. 336.

favour of a power of appointment in a surrender of copyholds, and a limitation over in fee for want of any exercise of the power, but also of a limitation of one fee upon another on a contingency. It was an ejectment for copyhold lands in H. in Norfolk, and the following case was reserved for the opinion of the Court of C. B.—S. S. widow, a copyholder in fee, surrendered in court to the use of her son J. S. and Elizabeth his wife during their lives, and the life of the longer liver of them, and after the decease of the survivor of them, to their child or children, male or female, in such proportion, &c. and for such estate, &c. as the parents or the survivor should by any *surrender* or *surrenders* thereof, and according to the custom of the manor, or by his or her last will and testament, direct, declare, limit, or appoint, and for want of such direction, &c. then to all and every the child and children of the said J. S. and Elizabeth his wife, *and their heirs*, equally to be divided between them as tenants in common, and not as joint-tenants; *and for want of such issue*, then to the right heirs of the said J. S. for ever. J. S. and Elizabeth his wife were at the same court admitted tenants, to hold according to the uses aforesaid, and J. S. immediately afterwards surrendered the premises to the uses of his will.

Elizabeth S. died, and J. S. her husband, who survived her, by his will devised to his daughter S. S. and her heirs for ever when she attained

the age of twenty-one years, all his messuages, lands, tenements, and hereditaments, in H. aforesaid, and if she died before she should attain twenty-one, then he devised the said hereditaments unto his sister Ann Dunt, the wife of Thomas Dunt, of H. aforesaid, and her heirs for ever, subject to the following condition, viz. in case his said sister Ann should at any time when she was possessed of the said messuages and lands, make sale thereof to any person or persons, then his will was that the said Ann his sister, did pay to his brother the sum of £50, out of the money arising by such sale. J. S. died and left only one child, his daughter S. S., by his said wife Elizabeth, who on her father's death took possession of the premises, and died seised in 1765, an infant.—Mary, the wife of Thomas Buxton, (the lessor of the plaintiff) was the cousin and heir of S. S. the infant, and Thomas Dunt, the defendant, was husband of Ann Dunt the sister and devisee of the testator J. S. The question for the opinion of the court was, whether the plaintiff as lessee of Thomas Buxton and Mary his wife, in right of the said Mary, the heir of S. S. the infant, was intitled to recover in the ejectment. And the whole court were clearly of opinion, that J. S., the testater, had no power or authority to make the will and surrender as above, but that there being only one child of the testator by his late wife, *that* child was intitled to the whole of the premises in fee; and Mary

Buxton being her heir at law, the plaintiff had judgment.

It is true that the court, in the last case, did not express any suspicion of the legality of the power of appointment, but it is worthy of remark, that this case was determined on the circumstance of there being only one object of the power, and that the validity of the power, or of the limitation over in default of any exercise of the power, was not brought into question, the child being clearly entitled to the fee.

In the case of *Lord Kensington* v. *Mansell* (175), the lord of the manor sought by his bill in equity, to discover the exact purport of an instrument of appointment, and to have the benefit of it upon a trial of an action in ejectment, for the satisfaction of his fine, under 9 Geo. 1. c. 29. The facts disclosed by the case were these. Upon the marriage of W. B., a copyholder in fee, in 1760, some deed or deeds, or writings, were executed by him, whereby he covenanted to surrender the copyhold estate in question, to the use of himself for life, with remainder to trustees to preserve contingent remainders, remainder to his intended wife for life, remainder to trustees to preserve contingent remainders; remainder to the use of any one, two, or more child or children of the marriage, in such shares, and for such estates, and with such limitations and provisions, as the said W. B. should by deed or will appoint; and

(175) 13 Ves. 240.

in default of such appointment, to the use of all and every the child and children in tail general; and in default of issue of the marriage, to W. B. and his heirs.

On the 11th April 1768, W. B. made a surrender of the copyhold premises, and was again admitted to the uses of the settlement, and he did not on such re-admission pay any fine, as he had paid his fine on his former admission. In 1799 W. B. in pursuance of the power of appointment vested in him by the settlement, and in contemplation of a marriage between *Elizabeth* his only daughter and *M. D. M.*, executed some deed or deeds, appointing all the copyhold premises to or for the benefit of his said daughter, or her intended husband and her issue, whereby (according to the statement in the bill,) the daughter became intitled to an estate for life, or some larger estate expectant on the determination of the estate for life of W. B. It further appeared by the bill that the marriage took place, and that W. B. died in 1803, whereupon M. D. M. and his wife, or he in her right, entered; and at a court held the 29th July 1803, the homage presented the death of W. B., of which presentment M. D. M. and his wife had notice; and on the 21st October 1803, Elizabeth M. was admitted by attorney, pursuant to the Act 9 Geo. 1. c. 29., and a fine was accordingly assessed by the lord for such admission, which M. D. M. and his wife refused to pay. In Hilary Term 1804, the lord

it was for the defendant to prove it. That if it were shewn, that she was not admitted according to the act, then the nonsuit was right; But how was it incumbent upon the plaintiff to prove that appointment? That when the tenant for life came on behalf of himself, and all in remainder and reversion, if the lord did not take the fine, he could not afterwards insist upon the fine from those in remainder. That the lord might apportion the fine among the different parcels of the inheritance: but it was not possible to say the tenant for life should pay nothing, and those in remainder should pay the whole. That the appointee, when once become such, was the same as if originally named in the first instrument: the appointment being only an instrument enabling him to succeed under the first instrument. Lord Eldon afterwards stated, that he had not been able to get information from the quarter he expected, as to what passed at the trial, but he had received information sufficient to ascertain, that the bill did not accurately state the transactions in the case. The order was that the demurrer should be allowed: the plaintiff to be at liberty to amend the bill. This was accordingly done by introducing at length, the surrender made by W. B., stating specifically the uses of the settlement, and a subsequent presentment stating the deed of appointment, by which W. B. appointed the premises to Mrs. M., his daughter and only surviving child, her heirs and assigns for ever,

subject to his estate for life. A general demurrer was also put in to the amended bill, which was argued before Lord Erskine C., who allowed it, on the ground that the act of 9 Geo. 1. c. 29. providing for the admission of infants and femes-covert, was confined to the title by descent or surrender to the use of a will: Nothing of importance fell from his lordship on the principal point, beyond a clear expression of opinion, that an appointee of the copyhold under the power, would be on the footing of a person in remainder (176).

The only observation I think it necessary to make on the last case, is, that no question was raised as to the validity of the power of appointment, and that none, in my opinion, could have been raised upon it, as far as any exercise of the power fell short of an absolute disposition of the whole customary fee-simple; and as the limitation over, in default of appointment to W. B. and his heirs, was inoperative, the estate continuing in him, (subject to the previous uses of the surrender,) as part of his old reversion, even an appointment in fee would not have had the effect of displacing the estate of a remainder man in fee.

And I must here again remind the reader, that a surrender neither vests an immediate estate in the surrenderee, nor creates a seisin in the lord to supply a use, and this material distinction between a conveyance of freeholds since the stat. of Hen. 8., and a surrender of copyholds, may

(176) See further as to this case post, tit. 'Fine.'

serve to shew, that a power of appointment over copyholds may exist consistently with the position, that such a power cannot be made the medium of springing and secondary limitations, in imitation of the practice in freehold cases. On the admission of the surrenderee of copyhold land, he becomes seised of the estate limited to him by the surrender, rather as the nominee, than as the assignee of the interest, of the surrenderor, a surrender being in its nature an authority or direction only to the lord, to admit this or that particular person (177); and whether it authorises the admission of A., or of such person as A. shall name to fill the tenancy intended to be vacated by the surrender, can be of no importance.

It must however be conceded, that this right of nomination, when given to a stranger, or when reserved to the copyholder himself to be exercised by deed, the fee being limited over to a stranger in default of any appointment, somewhat militates against the position, that a fee is not capable of being limited upon a fee in an immediate surrender of copyholds; and it may perhaps afford a case of exception to that rule; but it by no means follows, that a power of appointment of copyholds is, in all cases, to be assimilated to a power of appointment of freeholds under the operation of the statute of uses, and I must suppose, that such springing and shifting uses and powers, as are allowable in freehold cases, and

(177) Ante, p. 173.

which are supplied by the seisin of the feoffee or releasee of the inheritance, are incapable of being created in a surrender of copyholds, where the statute has no operation (178): And even with respect to the power of appointment or nomination in copyhold cases, it may be very doubtful, whether, after the tenancy is filled by an admission to the whole customary fee-simple under a surrender of copyholds, such estate in fee could be displaced by the exercise of an antecedent power of appointment created by the same surrender; and should it be thought that, from the peculiar nature of a surrender, this mode of limiting a fee upon a fee in copyhold cases is allowable, yet some very decided judicial authority may be deemed requisite to establish, that one fee can be substituted for another by an immediate surrender, through the medium of a limitation in the nature of a power of revocation and new appointment of uses, unknown to the common law, but which has been introduced into settlements of freehold property, since the stat. of 27 Hen. 8.

I have not overlooked another circumstance mentioned by Mr. Sanders as favourable to the limitation of a fee upon a fee, and powers of revocation, &c. in an immediate surrender of copyholds, viz., that forms of settlements containing such limitations are to be found in ancient books of precedents. In the book called the English Copyholder, published in 1735, (page 403), there

(178) See Atherley on Marr. Sett. p. 570.

certainly is the form of a surrender by J. B. into the hands of the lord, by the acceptance of two tenants, to the use of himself, his heirs and assigns, until the solemnization of a marriage then intended between W. B. his son and C. L., and after such marriage, to the use of W. B. and C. his intended wife, for the term of their natural life, and the life of the longest liver of them, and from and after their decease to the use of such child and children as should be begotten by W. B. on the body of C., share and share alike, and to the heirs and assigns of such child or children for ever, according to the custom of the said manor; and in default of such issue then to the use of the said J. B., his heirs and assigns for ever (179).

But with respect to the form copied, in part, by Mr. Sanders, from the same book, p. 385, so far from being favourable to the practice it is cited in support of, it would appear to have been worded with the impression, that springing and secondary uses, and powers of revocation, &c. could not be introduced in settlements of copyhold property, except by vesting the legal fee in trustees; for it is observable, that the whole *legal* customary fee was so limited as to be capable of being transferred to a purchaser, in case the power of sale had been exercised before the con-

(179) And see 2d vol. Horseman's Preced. 472-5; 3d vol. 440-1. Jacob's Court Keeper, [7th Ed.] p. 226. Calth. Read. 31-2. cited by Mr. Sanders in his Treatise on Surrenders, p. 54. Ante, p. 202.

tingent estates vested, or during the minority of the persons beneficially intitled under such contingent limitations. The estate was surrendered by G. C. the elder to such uses as should be declared by a deed intended to bear even date with the surrender: And by a deed purporting to be a *post nuptial* settlement of copyhold property belonging to the said G. C. the elder; reciting a marriage had between G. C. the younger and J. C. then his wife, and that in consideration thereof, and of the portion paid by Sir W. J. (father of the said J. C.) the said G. C. the elder did covenant to make, and had accordingly, on the day of the date of the same deed, made the aforesaid surrender; It was witnessed that in consideration of the said marriage and portion, and for the settling, &c. the said G. C. the elder did limit, declare, and appoint, and it was by all the parties thereto limited, declared, and appointed, that the said surrender should enure to the uses, &c. after mentioned, viz. To the use and behoof of the said G. C. the younger for his natural life, and after his decease to the use of the said J. his wife for her natural life in part of her jointure, and after the decease of the longer liver of them, the said G. C. the younger and J., To the use and behoof of the said Sir W. J. F. J. A. B. Sir J. P. and Sir R. P. their, &c. [executors and administrators] for the term of 200 years, Upon the trusts after expressed, and subject thereto To the use and behoof of the

said Sir W. J. his, &c. [heirs and assigns] Upon trust and confidence to permit and suffer the first and other son and sons of the said G. C. the younger by the said J. his wife successively and according to seniority, and the heirs male of their respective bodies, to receive the rents and profits thereof, and for default of such issue Upon the like trust for the benefit of an after born son or sons of the said G. C. the younger by the said J., and the heirs male of his and their body and bodies successively, and for default of such issue Upon further trust and confidence, that the said Sir W. J. *his heirs and assigns should surrender* the premises to the use and behoof of the said F. J. A. B. Sir J. P. and Sir R. P. their, &c. [executors and administrators] for the term of 300 years, Upon the trusts after expressed, and subject thereto, Upon further trust and confidence that the said Sir W. J., *his heirs and assigns, should surrender* the premises to the use and behoof of the said G. C. the elder, his heirs and assigns for ever. And after declaring the trusts of the aforesaid respective terms of 200 years and 300 years, the following provisoes were inserted in the said settlement, viz. "Provided always, "and it is covenanted declared and agreed, "by and between all the said parties to these "presents, and it is the true intent and meaning of "them and every of them, and of these presents, "and it is hereby declared, limited, and ap- "pointed, that it shall and may be lawful to and

"for the said G. C. the younger, and the said "G. C. the younger shall have full power and "authority by any deed or deeds, writing or "writings, to be by him sealed and subscribed "in the presence of three or more credible wit- "nesses, to declare, limit, or appoint, the copy- "hold messuages, &c. thereinafter particularly "mentioned, viz. the mansion house at, &c. and "every or any part or parcel thereof, to any "woman or women that at any time thereafter "he the said G. C. the younger shall happen to "marry, for the term of the life and lives only of "such woman or women, for her and their respec- "tive jointure or jointures, or livelihood, and in "lieu of her dower and thirds at the common law; "and it is hereby declared, limited, and appoint- "ed, that the said surrender herein before recited "as to the said messuages, and other the last "mentioned premises, from and after such decla- "ration, limitation, and appointment, of the said "G. C. the younger, shall be and enure, to the "use of the said woman or women from the time "as he shall happen to marry, for and during her "or their natural life or lives, for their respective "jointure or jointures, or livelihood, as aforesaid, "any thing herein to the contrary in anywise "notwithstanding.

"Provided always, and it is further covenanted, "declared, and agreed, by and between all the "said parties to these presents, and the true in- "tent and meaning of them and of these presents,

"and of the said surrender, was and is, that if "the said G. C. the younger, and J. his wife, or "the survivor of them, by and with the advice "and consent of the said Sir W. J. and G. C. the "elder during their joint lives; and if it shall "happen that the said Sir W. J. shall die first, "then after the decease of the said Sir W. J. by "and with the advice and consent of the said "G. C. the elder, with F. J. and A. B. or either "of them; and if it shall happen that the said "G. C. the elder shall die before the said Sir "W. J. then after the decease of the said "G. C. the elder, by and with the advice and "consent of the said Sir W. J. with the said "Sir J. P. and Sir R. P. or either of them, shall "be minded to sell and dispose of the said pre-"mises in S. aforesaid, or any part thereof, *that* "*then and in such case it shall and may be lawful* "*to and for the said G. C. the younger and J. his* "*wife, and the survivor of them, and the said Sir* "*W. J. to surrender the said premises, all or any* "*part thereof as shall be agreed to as aforesaid,* "*into the hands of the lord of the said manor of,* "*&c. to such person and persons, and for such* "*estate and estates, and to such uses, intents, and* "*purposes, as by the said G. C. the younger and J.* "*his wife, or the survivor of them, by and with* "*the consent aforesaid, shall be limited and de-*"*clared, and that such surrender or surrenders of* "*the said premises, or any part thereof, by the said* "*G. C. the younger and J. his wife, or the survivor*

" *of them, and the said Sir W. J., and the estate* " *and estates, uses, intents, and purposes, limited* " *and declared thereupon, shall be good and effec-* " *tual in law to all intents and purposes, any thing* " *hereinbefore to the contrary in anywise notwith-* " *standing.*"

[Then follows the usual direction for the investment of the monies arising from sale in the purchase of other estates; and that the respective limitations by virtue of the several powers should take effect according to priority of time in the creation thereof, without regard to the order of such powers; with covenants from G. C. the elder for the uninterrupted possession and further assurance of the premises surrendered as aforesaid.]

I would submit that the present question is far from being assisted, either by the forms of settlement above particularly noticed, or by the precedents of copyhold assurances to be found in Horseman's and other similar publications, wherein those precedents are chiefly confined to deeds of covenant, or agreements, on the part of the copyholder, to surrender his copyhold lands to particular uses; and although the uses are stated in those instruments, precisely on the plan of a freehold settlement, where the operation of the stat. of Hen. 8. is in the contemplation of the parties, yet it is possible that such covenants or agreements might have been carried into effect at that period, as they clearly would be now, according to the general practice of the profession, by vest-

said J. A. G. begotten, and to their several heirs and assigns for ever, as tenants in common, discharged of any further or other limitation whatsoever: provided, and it was thereby declared, that if the said J. A. G. at the time of his decease should leave one or more male issue to inherit as aforesaid, then and in such case it should and might be lawful, and should be construed, and the trust therein reposed, and the execution of the said indenture was and were thereby declared to be upon this condition, that the said J. A. G. did thereby reserve a power to himself, which he should have liberty and be fully empowered, in and by his last will and testament duly executed, or by any other his act and deed in writing duly executed, to charge and make chargeable the said surrendered premises, with any and what sum and sums of money, to the use of all or any of his other children lawfully begotten, which he should in and by such will, or such other his act and deed in writing, duly executed, direct, limit, and appoint; and for default or want of such issue, to the use of the plaintiff (then L. G.), during the term of her natural life, if she should be then living; and from and after her decease, (the said J. A. G. being dead without issue as aforesaid,) to the use of all and every the children of the plaintiff, lawfully begotten, their heirs and assigns for ever, as tenants in common, share and share alike; and for default of such issue, to the right heirs of the said J. A. G. for ever.

J. A. G. died the 10th of January 1811, having only had three daughters, who all died in his lifetime unmarried: In 1803, and subsequent to the death of his three daughters, J. A. G., being advised that he had an absolute power of disposition over the premises, in the event of his dying, without leaving any issue surviving him, subject to the life estate therein of the plaintiff, and subject also to such other uses of the said settlement, if any should take effect after her decease, surrendered the premises to the use of his will; and by his will, dated 10th August 1809, and a codicil dated 9th January 1811, devised the said estate in favour of the defendants, (*James Brandwood* excepted). The plaintiff upon the death of the survivor of the three daughters of the said J. A. G. was the heir at law of such three daughters, and heir according to the custom of the manor of which the said premises were held; and by her bill insisted that upon the death of J. A. G. she became intitled to the surrendered premises in fee-simple in possession, as heir to her said three nieces, and prayed that the defendant James Brandwood, the surviving trustee, might be decreed forthwith to surrender the premises to her, or as she should direct. The defendant James Brandwood by his answer insisted, that the defendants, the devisees of J. A. G., were entitled, but submitted to act as the court should direct. The other defendants (the devisees), claimed to be entitled to the interests devised to them by J. A. G.; and insisted

that by virtue of the limitation of the indenture of 13th Feb. 1778, and in consequence of the events which took place, the ultimate reversion in fee of the copyhold premises, was vested in J. A. G.; and that, subject to such estates and interests as were given by that deed, he had a right to dispose thereof, and had effectually disposed of the same by his will; and that the plaintiff as heir at law, or customary heir of the daughters of J. A. G. or otherwise, was not entitled to the premises.

The Vice Chancellor. "The question is, what is now the right of the plaintiff Love Hampson? that depends upon the words of the deed of 13th February 1778. Being a deed to declare uses, it ought to receive a liberal interpretation according to the intention of the settler, consistently with the words he has used. After some recitals the deed proceeds to the limitation, the construction of which is now in question. The defendant, the trustee, by his answer, insists, that the limitation of the copyhold estates to the daughters of John Abbs Gorton was not a vested, but a contingent, limitation; and that the fee-simple was not vested in the plaintiff as heir at law of the daughters, but continued in John Abbs Gorton; and that he had an absolute power of disposition over the premises, in the event of his dying without having any issue surviving him, subject to the life estate therein of the plaintiff; and subject also to such other uses of the settlement as, if any, should take effect after her decease.

It was certainly a contingent limitation in fee-simple to the daughters; but on their coming into existence, and dying, the contingent limitation of the inheritance to them, descended on their heirs (*a*); it being a rule that a contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens; except where the existence of the devisee of the contingent interest, at some particular time, may by implication enter and make a part of the contingency itself upon which such interest is intended to take effect (*b*). Here the daughters to whom the contingent limitation of the estate was made, came into existence, and therefore, on their deaths, it descended on their heirs. It was a double limitation, first to the sons in fee, and for want of sons there is a substantial limitation to the daughters in fee. Whether the estate thus vested in the daughters on their birth, would have opened again in favour of an after-born son, it is not necessary to decide. It has been argued, that the first limitation to the sons was too remote, and therefore bad, and that consequently the subsequent limitations were bad; that the words "first male issue lawfully begotten by the said John Abbs Gorton, which should attain twenty-one years, and to the heirs

(*a*) *Vick* v. *Edwards*, 3 P. Wms. p. 371. *Weale* v. *Lower*, Polexf. 54.

(*b*) Fearne on Contingent Remainders, p. 364, Butler's Edit.

and assigns of such male issue," means, male descendants; and that as the first son might have lived till twenty, and died leaving a son, who might also have died under twenty, leaving a son, and so on; the estate might have been rendered unalienable beyond the period allowed by law, and *Davenport* v. *Hanbury* (*c*), *Freeman* v. *Parsley* (*d*), and *Leigh* v. *Norbury* (*e*), have been cited to show, that the word *issue*, is construed to mean *descendants*. It is true, that primâ facie the meaning of the word *issue*, is *descendants*; but wherever, in a deed or a will, the intention appears to be, that the word *issue* should not mean *descendants*, but *children*, the courts give it such a construction; as in *Sibley* v. *Perry* (*f*), where the word *issue*, was construed *children*. In the present case, to interpret the word *issue* to mean *descendants*, would be to render the deed a mere nullity. A deed, if possible, must be interpreted so as to be effectual—*ut res magis valeat*. If in this case the words *male issue* are construed *sons*, the deed is good and effectual, because it must be known at his death whether or not he has sons. If *issue* here means *descendants*, we must reject the words "begotten by the said John Abbe Gorton." No case has been found where issue "begotten by" the settler, has been held to mean other than children. The word *issue* in this deed is used synonymously

(*c*) 3 Ves. 257.
(*d*) Ib. 421.
(*e*) 13 Ves. 340.
(*f*) 7 Ves. 522.

with *children*, and not *descendants*. It was used in the same way in his father's will, which he might have had in his recollection. The provision in the deed, that if male issue were born, the father should have a power of providing for his other children, strongly shows that by male issue, was meant, sons. Where he speaks of issue, generally, he means children. He first gives to his male issue, and in default, to his daughters; thereby contrasting them with his sons, whom he denominated under the term *male issue*. He discovers no intention to provide for remote descendants, except through their parents. There are difficulties, I admit, in construing the words "male issue" to mean "sons;" for, according to this deed, if he had two sons, and his eldest son died in his lifetime, leaving a son, such son would not take, but the second son on attaining twenty-one during the minority of his nephew, would take, in exclusion of the son of the eldest son. But if the words "male issue" are to be construed "*descendants*," difficulties would equally occur; for if having only daughters, say seven, and one had a son, that son on attaining twenty-one, would take, in exclusion of his mother, and of all the other daughters. In default of male issue the estate is given to the daughters "discharged of any further or other limitation whatever;" in these latter expressions, following probably the words used in his father's

will, and meaning that they should take, without being subject to the power reserved in case there should be male issue which took, and without the necessity of arriving at twenty-one before they could take, as in the limitation to the male issue. The power reserved in case there was male issue was natural, that younger sons and daughters might be provided for; but if there were only daughters the estate was to go to them equally, and the reservation of such a power was unnecessary. It is said, the words after the limitation to the daughters, " for and in default of such male or female issue, to the use of Love Gorton," cut down the fee which would pass by the words previously used in the limitation to the daughters, to an estate tail. It is not said, " in default of *issue of the body*," &c.; and if by issue he meant children, as I have endeavoured to show, it only means, that if he has no children, then the estate is to go to *Love Gorton* the next object of his bounty. To construe the words as giving an estate tail, would be contrary to the plain meaning of the language used in the limitation to the daughters, which gave a fee " without any further or other limitation;" but taking issue to mean children, every part of the instrument is capable of taking effect. It was urged that in *Lee & Brace* (182),

(182) See C. J. Willes's Observations on the case of *Leigh & Brace*, ante, p.p. 178-9, 180.

reported in *Lord Raymond* (*g*), the words "*for want of issue*," were held to cut down a previous fee which had been given, to an estate tail; but that case appears to have been misreported in *Raymond*, and that the words were "for want of issue *of the body*, &c." as appears by the report of the same case in *Modern Reports* (*h*), and in *Carthew* (*i*); that was a strong expression, indicating a clear intention. The case which approaches nearest to the present is *Doe* v. *Perryn* (*k*). "In the first place then," says *Lord Kenyon*, "do these words confer an estate tail, or a fee in *Dorothy's* Children? The words are, 'To all and every the children of *Dorothy*, begotten or to be begotten on her body by *James Comberbach*, and *their heirs for ever*; and *for default of such issue*, &c. then over.' Now words more emphatical cannot be used to create a fee, than to 'A. and his heirs for ever.' Undoubtedly these words may be controlled by subsequent ones; and were properly so in *Ives* v. *Legg*, cited by the defendants counsel; because there the limitation was to his daughter, and the children of her body begotten, and their heirs, and afterwards to a person who might by possibility have been heir to those children. That

(*g*) Ld. Raymond, 101.

(*h*) 5 Mod. 266.

(*i*) Carth. 343. The same case is reported in Holt, 668, where the words are "for want of issue of him."

(*k*) 3 T. R. 484.

sufficiently explained the intention of the devisor, because there could not be a failure of heirs general while the remainder-man, or any of his descendants, were living. But that case differs from the present, because there the limitation over was, 'in default *thereof*,' namely, *heirs;* and here, 'in default of *issue*,' which is referrible to *children*. It has been argued, that this testator contemplated that he might have no children, or that they might die in his lifetime, and that under that idea, and for default and want of issue, he limited over the estate to the plaintiff for life, and to her children in fee, and for default of such issue to his own right heirs; and that the words "for default and want of issue," mean, "in default of issue living at my death;" but the words "in default of issue" are not construed to mean "in default of issue living at my death," unless in cases of *personal* estate, as was stated by Mr. Justice Buller in *Doe* v. *Perryn* (*l*). I do not find any words in this settlement expressive of an intent, that if the settler had daughters in his lifetime, who should die, that the estate should go over; but he appears to have meant, first, that his male issue, his sons, should take a fee, and if there were none, then that his daugh-

(*l*) 3 T. R. 494. Lord Kenyon appears to have been of a different opinion in *Porter* v. *Bradley*, 3 T. R. 143., but *Lord Eldon*, in *Cooke* v. *De Vandes*, 9 Ves. 197, 203, concurs in the opinion of Mr. *Justice Buller*.

ters should take a fee. The plaintiff, therefore, must have a decree according to the prayer of her bill."

Of Surrenders on Condition, and Release of Right.

COPYHOLDS may be surrendered on condition (183), and if the condition is performed according to the terms of the surrender, the surrenderor (even though the surrenderee has been admitted), may re-enter without new admittance (184), for he will be in of his old estate; but if the condition is broken, for instance, when upon a mortgage of copyholds, the surrenderee is admitted, and the money is not paid at the appointed time, so that there is an equity of redemption only remaining in the surrenderor, there, his re-admittance is necessary (185); which admission, as I have already shewn, will break the line of descent of an estate taken from the maternal ancestor (186).

If the condition is strictly performed, or when, in the case of a mortgage, the money is repaid before the admittance of the surrenderee, the steward's entry of such performance or payment,

(183) *Wade's* case, 5 Co. 114. Ante p.p. 159. (n. 90.) 206. But a power of re-entry cannot be reserved to a stranger. *Gooch's* case, Lane 99.

(184) Gilb. Ten. 276. *Simonds* v. *Lawnd*, Cro. Eliz. 239.

(185) *Fawcet* v. *Lowther*, 2 Ves. 300. Gilb. Ten. 276.

(186) Ante, p. 56.

in the margin of the court rolls, will alone be sufficient (187); and if the surrender has not been presented according to the custom of the manor, no notice need be taken of it on the rolls (188).

When the condition is for the payment of a sum of money, tender of the money by the surrenderor will save the condition (189).

A condition, or an equity of redemption, may be released by deed to the surrenderee, if he has been admitted, even should the condition not have been forfeited (190); and, indeed, after admittance of the surrenderee, the equity of redemption cannot properly be extinguished by a surrender, although such surrender might possibly be held to operate as a release.

(187) Although it is very usual to discharge a conditional surrender of copyholds by way of mortgage, by an entry of this nature, *at any time* before admittance, yet there is an evident irregularity in so doing, after the condition is forfeited.

Where a conditional surrender was forfeited, and it was desired that the old surrender should be taken up, and a new one made, but the lord insisted that the mortgagee should be admitted and pay a fine, and caused proclamations to be made for that purpose, the Court of Chancery refused to interfere, except to direct an issue to try the question, whether the lord was bound by the custom to accept the second surrender, *Tredway* v. *Fotherley*, 2 Verh. 367.

(188) *Fawcet* v. *Lowther*, 2 Ves. 302.

(189) *Wade's* case, 5 Co. 114. b. Gilb. Ten. 276. Co. Litt. 209. a. et seq. and see *Paulter* v. *Cornhill*, Cro. Eliz. 361.

(190) *Kite* & *Quainton*, 4 Co. 25. *Hull* v. *Shidbrook*, Cro. Jac. 36. Co. Litt. 59. a. Ib. (n. 2.)

A release of right to a person who has been wrongfully admitted is a good extinguishment of such right (191); and a surrender by a feme covert and her husband, to the tenant in possession by a wrongful title, the right being in the wife, who was secretly examined as to her consent before the steward, was held, in the case of *Stone* v. *Exton* (192), to be a good release of the right, without any particular custom for it; but with the exception of a feme covert, who cannot release a copyhold interest by deed, it should seem, that a mere right is not properly the subject of surrender (193).

A release which would operate to the prejudice of the lord, could not be supported (194); therefore should there be a custom in a manor enabling the lord to compel a surrenderee to come in and be admitted, I apprehend that the right of any person to whom a surrender should be made, could not be extinguished by a deed of release; and it is to be recollected that an unadmitted disseisor, is not capable of a release (195).

(191) *Kite* & *Queinton*, 4 Co. 25. *Blemmerhasset* v. *Humberstone*, Hut. 65. Co. Litt. 59. a. (n. 2.) Co. Cop. s. 36. Tr. 83-4; and see *Whitton* v. *Williams*, Cro. Jac. 101. 10 East, 595, in *Doe* & *Brightwen*. 6 Vin. Cop. Z. a. pl. 2, 7, 11.

(192) 2 Sho. 83.

(193) *Kite* & *Queinton*, *Hull* & *Sharbrook*, ubi sup. and see *Mortimore's* case, Hetl. 150. 6 Vin. Cop. Z. a. pl. 8. 1 Watk. on Cop. 61. 1 Vol. Ca. & Op. 158, and *Spindlar* & *Wilford*, 2 Vern. 16.

(194) See ante, (n. 191.) 6 Vin. Cop. Z. a.

(195) *Mortimore's* case, *Kite* & *Queinton*, sup. *Wake-*

A release of right would at a very distant period be presumed in favour of a person who had procured admission, but in the case of *Doe* d. *Milner* v. *Brightwen* (196), it was held, that a release of right could not be presumed during the existence of a legal interest which would preclude the assertion of the right, nor within 20 years after it had terminated.

Of Surrenders to CHARITABLE USES: *And herein of* MORTMAIN.

COPYHOLDS may be conveyed to a charitable use as well as freeholds (197), and when, prior to the statute of 9 Geo. 2. c. 36, a copyholder was desirous of settling his estate for the benefit of a charity, it was the usual practice to surrender to some friend, to the use of [or rather in trust for] the particular charity; and as such surrender did not operate to the prejudice of the lord with respect to his services, (the surrenderee becoming the tenant of the land, and the use [or trust] only vesting in the charity,) the lord was compellable to admit the surrenderee; but it should seem that a charitable use could not at any period have been

ford's case, 1 Leo. 102. Gilb. Ten. 118, 193. 6 Vin. Cop. Z. a. pl. 3, 7, 11 marg., 12.

(196) 10 East. 590, 596.

(197) *Kenson's* case, 1599, in Canc. Duke's Char. Uses, 80. Same by Bridgman, p. 361. *Att. General* v. *Foyster*, 1 Anst. 116.

created of a copyhold interest, to the prejudice of the services due to the lord (198).

It was also a common practice, prior to the above statute, for a copyholder, by his will, to empower his executors, or some sole or aggregate corporation, to sell his copyhold lands, the produce to be applied to charitable uses, and the Courts of Equity would compel the heir to give effect to this intention (199), and, if necessary, supply the want of a surrender to the use of the will, as we shall presently see (200).

But as copyholds are clearly within the operation of the stat. of 9 Geo. 2. c. 36. (201), the only mode now of disposing of a copyhold estate for a charitable purpose, is to make a surrender of the legal interest to some proper person, either in the nature of a voluntary conveyance (should the lord object to any reference to a trust deed), or expressly upon the trusts of a deed of even date with the surrender; and then by deed referring to the surrender, to declare the charitable purposes desired to be created, which deed must

(198) *Ranshaw* & *Robottom* in Canc. 43 Eliz. cited in Duke's Char. Uses, by Bridgman, 135. This case shews that the lord is not compellable to admit a corporation; ante, p. 125. And see Duke's Ch. U. by Bridg. pp. 137, 162, 356. Bro. 'Fealtie & Homage,' pl. 15. Co. Litt. 66. b. 2 Lord Raym. 864.

(199) *Guiddy's* case, 4 Jac. in Canc. Bridgman's Duke Ch. U. 135.

(200) Post, tit. 'Surrender to Will.' 43 Eliz. c. 4.

(201) *Arnold* v. *Chapman*, (*Foundling Hospital* case) 1 Ves. 108. Bridgman's Duke Ch. U. 420. *Doe* d. *Howson* v. *Waterton*, 3 Barn. & Ald. 149.

be "indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve Calendar months at least before the death of the donor (including the days of the execution and death), and be inrolled in the High Court of Chancery within six Calendar months next after the execution thereof;" and such settlement must be made to take effect in possession for the charitable use intended, and be without any power of revocation, trust, or condition, for the benefit of the donor, or any person claiming under him (202).

In the report of the case of *Doe* d. *Howson* v. *Waterton* (203), which was an ejectment tried at the Summer assises 1819, for the county of York, before Wood B., the following facts are stated to have appeared: Robert Yoward, being seised of the premises, which were copyhold of the manor of *Rothwell*, surrendered them by writing dated 19 July 1743, into the hands of the lord of the manor, *to the use* of certain persons therein named, their heirs and assigns for ever; *in trust* nevertheless to and for the use, benefit, and habitation, of the poor of the town of *Rothwell* for ever. The trustees were duly admitted at a court holden October 12, 1743. The lessor of the plaintiff was the eldest son of the last surviving trustee, who died in 1786, and he was duly admitted

(202) See the act of 9 Geo. 2, in the Appendix. Vide also 52 Geo. 3. c. 102 (Appendix) for the registering Charitable Donations in the Office of the Clerk of the Peace.

(203) Ante, p. 249.

tenant the 20 October 1813, on inquisition of the homage, upon the like trusts. No evidence was given to shew when Robert Yoward died. At the trial it was objected by the counsel for the defendants that this surrender was void by the statute 9 Geo. 2. c. 36, none of its provisions having been complied with, and the case of *Arnold* & *Chapman* (204), was cited to shew that copyholds were within that act. The learned Judge being of that opinion directed a nonsuit. And upon a motion for a new trial it was contended, that though a devise of copyhold was held to be within the 9 Geo. 2. c. 36, in the case of *Arnold* & *Chapman*, yet a conveyance of copyhold, as here, in the lifetime of the party, was not within that statute; and that a copyhold could not pass by a bargain and sale enrolled, which was the form directed by the act. That it was not within the mischief intended to be remedied by the statute, a copyhold not passing by a private conveyance but by surrender only, which was a public act done openly in the lord's court. That the statute did not make void the legal estate, and therefore, as the plaintiff had been admitted, he might recover at law (205). Supposing, however, that a bargain and sale and an enrolment were necessary, that they might, after so long an enjoyment, be presumed to have

(204) 1 Ves. 108. ante, p. 249.

(205) *Doe* d. *Toone* v. *Copestake*, 6 East, 331.

existed (206). And, as to the objection, that it did not appear that the surrenderor survived for a year after the surrender, it was sufficient to say, that as it appeared he was alive when the surrender took place, the court would also presume that he continued alive for a twelvemonth afterwards. Abbot C. J. observed, that the case cited of *Arnold* & *Chapman*, was a distinct authority to shew, that copyhold as well as freehold lands, were within the operation of the 9 G. 2. c. 36. And if it were perfectly clear, that it was impossible for the mode of conveyance pointed out by the statute to be adopted, in the case of copyhold, the only consequence that would follow would be, that the statute would absolutely prohibit any conveyance of copyhold to charitable uses. But it would by no means be a legitimate consequence, that copyhold lands could lawfully be conveyed without the formalities required by that act. That the act was passed for the sake of public policy, and to prevent persons from conveying their lands to charitable uses in a secret manner, at or near to the time of their death. It therefore had directed the execution in the presence of two witnesses, and the enrolment in Chancery, and made it necessary that the party should survive for a year. That it was said, in the principal case, that the court might

(206) *Mayor of Kingston* v. *Long Buckby*, 7 East, 45. *Horner*, Cowp. 102. *Rex* v.

presume, if necessary, that a bargain and sale and enrolment had been made. But that the cases cited were very distinguishable from the principal one, and no instance could be found, where the court had presumed that an enrolment had been made. His Lordship was therefore of opinion, that no such presumption ought to be made, and that there were no sufficient grounds for granting the rule. Bayley J. was of the same opinion. The statute, he observed, meant to provide, that a party who conveyed his lands to charitable uses, should, at the time of such conveyance, be of full understanding, and that the conveyance should possess the greatest possible notoriety. That it was said, that by a surrender of copyhold openly in the lord's court, this would be effected. But that was not so; for, though the surrender itself be notorious, yet the uses to which the lands were surrendered, need not appear on the rolls of the court (207). Admitting (he said) that there could not be an operative bargain and sale in that case, still the parties might, at least, have attained the object of notoriety, by executing a deed declaring the uses of the surrender, in the mode required by the statute, and having it enrolled in Chancery; but that had not been done. That as to pre-

(207) In the case of *Car* v. *Ellison*, 3 Atk. 74. Lord Hardwicke held, that an indorsement made of the uses on the surrender, by the steward, was sufficient, without specifying them on the Court Rolls of the manor.

suming an enrolment, if it had appeared that the rolls of Chancery had been searched, and a chasm had been discovered about the period of this surrender, it might have been different. That at present there was no evidence, upon which such presumption could be founded. Holroyd J. said, that it appeared to him that copyhold lands were within the mischief intended to be remedied by the statute 9 G. 2. c. 36.; and, if so, that they fell within the rule of law, which says, that cases within the mischief of a statute, shall be held to be included in the general words of it. And although a copyhold must pass by surrender, and not by bargain and sale, yet it was clear, that the uses of the surrender might be declared, by deed indented and enrolled. That, however, (he added,) had not been done in the present case. Best J. concurred; and the rule was refused.

It is generally supposed that copyholds are within the mortmain acts (208), properly so called (209), and that as those acts extend to a

(208) 9 H. 3. c. 36. 7 Ed. 1. st. 2. c. 1. 13 Ed. 1. st. 1. c. 32 & c. 33. 34 Ed. 1. st. 3. 18 Ed. 3. st. 3. c. 3. 15 R. 2. c. 5. 23 H. 8. c. 10. See these statutes collected by Mr. Evans in his 1st vol. p. 2. class 5. Vide also 15 Vin. Abr. tit. 'Mortmain,' (A. 2.)

(209) Sir R. P. Arden, M. R. in *Corbyn* v. *French*, 4 Ves. 427, said, that the stat. 9 Geo. 2. c. 36. was commonly called the statute of mortmain, but very improperly, for it did not prevent the alienation of land in mortmain; nor was that the object of the act: it had nothing to do with that; the object was to prevent devises of land, or any interest in land, or bequests of money to be laid out in any such interest, for any *charitable* use whatsoever.

trust estate, a licence of the King (210) is necessary, when a surrender is made of copyhold lands to a trustee for a corporate body, not previously enabled by statute or licence to hold lands (211): But as the King is a sharer in the forfeiture created by the mortmain acts, it may, at least, admit of a question, whether they would be held to extend to a surrender of copyholds, either immediately to a corporation, or to a trustee for their benefit. And it is to be recollected, that copyholds are held not to be comprehended in the general words of the statute of 16 R. 2. c. 5, of Pope's Bulls, or of 2 H. 5. c. 7, of Heretics, or of 12 Car. 2, of Regicides, &c.; and principally because of the prejudice that would accrue to the lord, by the King's being a sharer in the forfeiture created by those statutes (212).

There are few uses, however, for the benefit of a corporate body, either sole or aggregate, that would not be deemed of a charitable nature, and be protected by the statute of 43 Eliz. c. 4. (213); but it is to be kept in mind, that a conveyance whether of freehold or copyhold property, which would have been aided formerly by the statute of 43 Eliz., must now be framed

(210) See 7 & 8 W. 3. c. 37.

(211) See 1 Watk. on Cop. 242. [2d Ed.]

(212) Co. Cop. s. 58. Tr. 123-4. 2 Sid. 43, in *Harrington* v. *Smith*, ante, pp. 97, 103.

(213) The endowment of a vicarage, for the encrease of the minister's maintenance, would seem to be a use of this nature. 1 Ed. 6. c. 14. Bridg. Duke Ch. U. 354.

with a due regard to the provisions of the act of 9 Geo. 2. c. 36.

It may here be proper to apprise the reader, that by the act of 55 Geo. 3. c. 147. (214), every parson, vicar, &c. is enabled to exchange his parsonage house and glebe lands, with the consent of the patron and bishop, for other houses and lands of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor belonging to the same benefice, such copyholds after the annexation to the benefice to be of freehold tenure: And also to annex to the benefice, any lands held by copy of court roll for life or lives, or for years determinable on a life or lives, of any manor being parcel of such benefice: And likewise, (where the existing glebe does not exceed five acres,) to purchase lands not exceeding twenty acres, of freehold tenure, or being copyhold of inheritance, or for life or lives, holden of any manor belonging to the benefice, such copyholds upon the annexation to become freehold tenure.

Of the revocable Nature of a Surrender.

WE have already seen that the lands of a copyholder are bound by the surrender, and it follows, that a surrender is not revocable when supported

(214) See this act in the Appendix.

by a valuable or other obligatory consideration; but a voluntary surrender may be revoked before, or even after it has been presented (215); this, indeed, assuming that copyholds are within the statute of 27 Eliz. c. 4, would be a necessary consequence of the rule, now so fully established in freehold cases, that a voluntary conveyance as against a purchaser, even with notice, is deemed to be fraudulent under that statute (216); but it is to be recollected, that the inducement to a marriage, is a sufficient consideration to support a voluntary settlement (217); and that covenants in marriage articles in favour of collateral relations, have been executed by the courts of equity (218):—Yet it should seem, that the marriage consideration does not run through the whole of a settlement, so as to induce a court of

(215) Co. Cop. s. 39. Tr. 97-8. Kitch. 121. *Gooche's* case, Lane 99. *Doe* & *Routledge*, Cowp. 705. *Burgoyne* & *Spurling*, Cro. Car. 273, 283. 6 Vin. Cop. (Y.) Ib. (T. a.) 1 Roll. Abr. 499, 500. (E.) 2 D'Anv. 180. pl. 2. 1 Watk. on Cop. 87.

(216) *Doe* & *Routledge*, sup. Ante, p. 100. tit. 'Statutes.' And see *Doe* d. *Otley* v. *Manning*, 9 East 59, and the cases there referred to. Vide also *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84. *Buckle* v. *Mitchell*, ib. 100. *Cormick* v. *Trapaud*, 6 Dow's P.C. 60. But a voluntary settlement is good as between the parties to it, 18 Ves. 92. *Smith* v. *Garland*, 2 Meriv. 123.

(217) 1 Atk. 190. Cro. Jac. 158, in *Colvile* v. *Parker*. 1 Ch. Ca. 99. *Heisier* & *Clarke*, 2 Eq. Ca. Abr. 46. pl. 13.

(218) *Vernon* v. *Vernon*, 2 P.W. 594. *Osgood* v. *Strode*, ib. 254. *Sutton* v. *Chetwynd*, 3 Meriv. 255. *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92.

equity to give effect to a covenant in favour of a perfect stranger (219). And it has been lately decided, that a limitation to a collateral relation, is not protected and rendered valuable, merely by its being found in a marriage settlement (220). But a limitation to collaterals cannot be defeated by a purchaser, when it is so interposed, as to be essential to the support of limitations valuable in their nature (221).

When and how Court Rolls may be amended.

A SURRENDER will not be avoided by an inadvertence of the steward, but on clear proof of the error, the rolls, it is said, shall be amended (222); and this would seem to be allowable, as far as respects any variance between a surrender and the entry of it on the court rolls of the manor; but when the legal estate has been drawn out of the copyholder by an actual surrender, not according with his design, and even contrary to written instructions, I must suppose that the

(219) *Sutton* v. *Chetwynd*, 3 Meriv. 255.

(220) *Johnson* v. *Legard*, cited 3 Meriv. 254, and since reported 3 Madd. 283. In this case the court of B. R. certified their opinion, that the limitations to collaterals were void against purchasers; and the Vice Chancellor confirmed the certificate. See also Lane's Rep. 22. The settlement being made by a tenant in tail does not alter the case. *Cormick* & *Trapaud*, 6 Dow, P. C. 86.

(221) *Clayton* v. *Lord Wilton*, 3 Madd. 302. n.

(222) *Kite* & *Queinton*, 4 Co. 25. 1 Watk. on Cop. 89. 2 ib. 45.

estate of the surrenderee, is incapable of being defeated at law, by any amendment of the court rolls.

In *Brend* v. *Brend* (223), a surrender made in pursuance of a deed of covenant to settle copyhold lands on the heirs male, was entered on the rolls, to the heirs general, and the surrender was decreed to be vacated, and a new surrender directed to be made according to the covenant.

The court of B. R. in *Burgess* & *Foster's* case (224), held, that the misentry of the date of the court should not prejudice the party, such entry not being a matter of record, but an escroll only; and that on issue joined of the time of the surrender, or of the time of the court, it should not be tried by the rolls of the manor, but by the country.

In *Hill* & *Wiggett* (225), an entry in the steward's book, and parol proof by the foreman of the jury, were admitted as good evidence that a feme covert had surrendered her whole estate, though the surrender on the roll, and the admission, were only of a moiety.

The case of *Winter* & *Jeringham* (226) is one of considerable interest, and was as follows.

(223) Fin. Rep. 254:—it is probable in this case, that the entry on the rolls corresponded with the surrender.

(224) 1 Leo. 289. S. C. 4 Leo. 215.

(225) 2 Vern. 547; and see *Towers* v. *Moor*, ib. 98: *Walker* v. *Walker*, Barnard. 214.

(226) Dy. 251. b. As to the admissibility of an averment in the construction of copyhold assurances, see ante, p. 162, et seq.

B. covenanted to convey all his lands and tenements holden of the manor of Hackney, and afterwards surrendered divers parcels of land by a specific description; the surrender was enrolled, and the following words added. s. "*by* "*the name of all the lands, tenements, and heredi-* "*taments, which he had and held of the aforesaid* "*manor on the day of this surrender, &c.*;" and the question was, whether more lands than were specified in the surrender should pass, which, says the reporter, "was much in debate for twenty-four years in several courts." The report of this case concludes thus, "And by the opinion "of *Dyer* no more than was particularly ex- "pressed in the surrender shall pass; and ac- "cording thereto a decree was made by *Lord* "*Wentworth* Lord and Chancellor of his manor "aforesaid, whereof he afterwards repented: "Yet many others agreed with the above opinion "as law."

Of the Mode of enforcing an AGREEMENT TO SURRENDER, *or a void Surrender: And of the proper Method of conveying an* EQUITABLE INTEREST *in Copyholds.*

A CONTRACT or agreement to surrender (227) or a surrender which is void for want of presentment in due time, will be enforced in equity in

(227) We have seen that, in strictness of law, a rent charge is not grantable by copy, ante, p. 123, and it is not, therefore, the subject of surrender and admittance, but those acts are

favour of a purchaser, or mortgagee (228), against the heir or widow, or the person next in succession where the first life in a copy has a power to dispose of the estate (229); and against a devisee (though a child of the testator), or a volunteer (230), or the assignees under a commission of bankrupt (231), or a surviving joint-tenant (232); and, as a consequence, against a purchaser with notice, in favour of a mortgagee (233), and also

evidence of an agreement for sale, and are good in equity. *Austin* v. *Smith*, 1 Leo. 315. *Spindlar* v. *Wilford* & *another*, 2 Vern. 16.

(228) It has been decided that there is no distinction between title deeds of freehold property, and copies of court rolls, when deposited by way of security, but that an equitable lien on the estate is alike created. Exparte *Warner*, 1 Rose's Bpt. Ca. 286. 19 Ves. 202.

(229) *Davie* or *Davies* v. *Beardsham*, or *Beversham*, et ux. 1 Ch. Ca. 39. S. C. 3 Ch. Rep. 4. S.C. Nels. Ch. Rep. 76. S.C. 2 Freem. 157. 9 Mod. 75. *Barker* v. *Hill*, 2 Ch. Rep. 218. *Bradley* v. *Bradley*, 2 Vern. 165. *Oxwith* v. *Plummer*, Gilb. Eq. Rep. 13. S.C. 2 Vern. 636. *Pattison* v. *Tompson*, 6 Vin. (O. e.) pl. 2. *Keen* v. *Sparrow*, *ib.* marg. *Hinton* v. *Hinton*, 2 Ves. 631-8. S. C. Amb. 277. *Brown* v. *Raindle*, 3 Ves. 257. 2 Freem. 65. *Greenwood* v. *Hare*, 1 Ch. Rep. 272. Ante, tit. 'Freebench.'

(230) *Martin* v. *Seamore*, 1 Ch. Ca. 170.

(231) *Taylor* v. *Wheeler*, 2 Vern. 564. S. C. 2 Salk. 449.; 10 Mod. 492. 2 Ves. 633. and see 1 Atk. 162, 191. 2 Atk. 562. 1 Stra. 242-3. 3 Br. Ch. Rep. 596. *Vide* also 1 *ib.* 269.

Assignees in Bankruptcy, after the commission is superseded, cannot enforce a contract for sale, previously abandoned on an objection to the validity of the commission, although the same persons are chosen assignees under a new commission. *Bartlett* v. *Tuchin*, 6 Taunt. 259.

(232) *Hinton* v. *Hinton*, sup. *Brown* v. *Raindle*, sup., overruling *Musgrave* & *Dashwood*, 2 Vern. 45, 63.

(233) *Jennings* v. *Moore*, 2 Vern. 609. *Blenkarne* & *Jennens*, 2 Br. Par. Ca. 278.

against a person having no interest at the time of the contract, but afterwards becoming intitled by right (234); though it seems doubtful whether the court would, in the latter instance, enforce the contract against the heir (235).

And a covenant in a marriage settlement to surrender copyholds (236), though of a voluntary nature, will be carried into effect against the heir, where it has influenced the general provisions of the settlement, so as to create an equity in favour of the persons interested under the limitations contained in it (237); but equity will not, as a general principle, enforce a covenant in favour of a volunteer (238).

A *parol* agreement for sale of copyhold lands stands precisely on the same footing as a parol agreement for sale of freehold property, and may be avoided by a plea of the statute of frauds (239); and proof of part performance of the contract

(234) *Morse* v. *Faulkner and others*, 1 Anst. 11.; and see *Clayton* v. *the Duke of Newcastle*, 2 Ch. Ca. 112. *Wiseman* v. *Roper*, 1 Ch. Rep. 158. *Goodtitle* d. *Faulkner and others* v. *Morse*, 3 T. R. 365. but see n. (231).

(235) *Morse* v. *Faulkner and others*, sup. *Parks* & *Wilson*, 10 Mod. 515. *Alison's* case, 9 Mod. 62.

(236) It would seem that a surrender of copyholds will not satisfy a general covenant in marriage articles to purchase and settle lands. *Attorney General* v. *Whorwood*, 1 Ves. 540-1; Belt's Supp. 240. And see *Pinnell* v. *Hallett*. Amb. 106. S. C. 2 Ves. 276; Belt's Supp. 344.

(237) *Neeve et al.* v. *Keck*, 9 Mod. 106.; *Marlow* v. *Maxie et al.* Fin. 388. 1 Vern. 240.

(238) *Bellingham* v. *Lowther and others*, 1 Ch. Ca. 243. 9 Mod. 106. [5th Ed.] And see ante, p. 257.

(239) 29 Car. 2. c. 3. s. 4.

equally takes the case out of the statute. So where there was clear evidence that no fraud had been practised, and that the defendant had done several acts of ownership, as ordering in bricks, fishing in ponds, &c. a specific performance of the contract was decreed against him by the Court of Exchequer (240).

Where there is a natural obligation or a moral duty to be fulfilled, equity will enforce an agreement to surrender, or supply a surrender which is void for want of presentment, equally as for a purchaser or mortgagee; but this aid is confined to a wife, children, and creditors, and is subject to the same rules in favour of the customary heir when unprovided for, and the same distinctions between a lineal and collateral heir, as prevail in cases of devise, where the copyholder has neglected to surrender to the use of his will: In *Rodgers* v. *Marshall* (241), the counsel for the defendant disputed the consideration of the deed

(240) *Borrett* v. *Gomeserra*, Bunb. 94. And see Sugden's Vend. and Purch. 98. et seq. [5th Ed.] 1 Fonbl. on Eq. c. 3. s. 8, Evans' Coll. of Stat. 1 Vol. pt. 2. cl. 1. No. 17.

(241) 17 Ves. 294; and see *Nendike* v. *Wilkes*, Gilb. Eq. Rep. 114. (in this case a specific execution of a bond given by the husband before marriage was decreed, but so as to secure the issue by making them purchasers). See also *Randal* v. *Randal*, 2 P.W. 464. An agreement to surrender entered into by the wife before marriage, will be enforced, though the husband die before it is done. *Baker* v. *Child*, 2 Vern. 61. *Cotter* v. *Layer*, 2 P.W. 625. *Vide* also *Fursaker* v. *Robinson*, Gilb. Eq. Rep. 139. (in which the aid was refused to a natural child,) and *post*, tit. 'Surrender to Will.'

stated in the bill, and contended that the equity of supplying a surrender was confined to a will, and could not prevail against a grandchild, having no other provision; and the Master of the Rolls is reported to have said, "Upon the evi- "dence I cannot take this to be a conveyance "for a valuable consideration. The question "then is, whether the defect is to be supplied, as "this is a conveyance for a younger son, upon "the consideration of love and affection; and "there certainly are cases of supplying the want "of a surrender upon a deed, as well as a will, "for a younger child; but upon the same prin- "ciple as in the case of a will, or the execution "of a power: that is, for and against the same "persons. It is said, this is the case of a disin- "herited heir; and it has been sometimes laid "down, that the Court will not supply the defect "against a disinherited heir; or, as the phrase "has been latterly, against an heir unprovided "for, that is, without any provision. Here they "have attended only to the former circumstance. "The answer states, that he inherits nothing, "unless he is entitled to this estate; but does "not say, whether he is, or not, provided for in "any other way. Some inquiry is necessary "upon that point, whether he has any other pro- "vision: if not, I incline to think, that, against a "grand-child, the want of surrender ought not to "be supplied. The question has never been de- "termined as to him; though as against a col-

"lateral heir it has been held, that it shall be "supplied." And an inquiry was directed, whether the defendant had a provision, and as to the nature and extent of it.

And where a settlement of freehold estates, (which was upon the husband and wife for life, with remainder to the first and other sons of the marriage in tail, with remainder to trustees for a term of years, for raising portions for daughters,) contained a covenant on the part of the husband to settle copyhold lands upon the same uses and trusts, *as far as the custom of the manor would allow;* and a surrender was made, but no term limited for securing the portions; it was decreed, that the copyhold estate should stand charged with the portions according to the prayer of the bill, which stated that there was no issue male of the marriage, and that the freehold estate was not sufficient to raise the portions for the daughters (242).

But in *Vane* v. *Fletcher* (243), the Court of Chancery refused to compel the heir to give effect to a voluntary settlement on remote relations, where the copyholder had given a letter of attorney to another to surrender, which surrender the steward refused to accept, because it was objected to deliver up to him the letter of attorney; the Chancellor observing, that this was a

(242) *Shouldham* v. *Shouldham*, 2 Vern. 321. and see *Wood* v. *Pesey*, 5 Vin. Cop. Contract, (O.) pl. 36. S.C. 2 Eq. Ca. Abr. 55. pl. 3.

(243) 1 P.W. 352.

lucky accident in favour of the heir, which equity ought not to deprive him of, any more than if the copyholder and the lord had disagreed about a fine, which had prevented a surrender, and that this being a voluntary conveyance, was not to be assisted in equity, like the case of a conveyance to a wife or child.

In all cases of necessity, as when from any particular circumstances, no court can be held to give effect to such disposition as the copyholder may be desirous of making of his estate, equity will supply the want of a surrender (244).

And very long adverse possession will render it unnecessary to seek the aid which is thus afforded in some cases by the Courts of Equity: So where a writ of *aiel* was brought in the manor court to avoid an estate, 'for that no surrender had been made;' it appearing that the rolls were lost, and that the defendant had been in possession for forty-five years, the Court of Chancery granted a perpetual injunction, on the ground that a surrender ought to be presumed (245).

AN EQUITABLE INTEREST in copyhold lands is not the subject of surrender (246), except in

(244) *Murrel & Smith*, 4 Co. 25. a. S.C. Cro. Eliz. 252. 1 New Abr. 472. pl. 6. And see 1 P.W. 354-5. 2 Vern. 584-5.

(245) *Knight* v. *Adamson*, 2 Freem. 106: And see *Lyford* v. *Coward*, 2 Ch. Ca. 150. S.C. 1 Vern. 195; vide also 1 H. Bl. 457-9. in *Roe & Lowe*, 1 Ves. 235.

(246) But a surrender is the only mode of passing a legal interest in copyholds, *whether*

the instance of a surrender for the purpose of barring an estate tail (247), but it is *assignable;* and the assignee of an equitable estate, on taking a surrender from the person in whom the legal copyhold interest is vested, may compel an admission upon payment of a single fine.

In the case of the *King* v. *the Lord of the Manor of Hendon and his Steward* (248), A. had covenanted to assign and surrender to B, and the covenant was presented by the homage. B. assigned to C. who took a surrender from A, and an application of C. to be admitted was resisted by the lord, on the supposition of his being intitled to a fine from B.; but upon a motion for a mandamus to compel the lord or his steward to admit C, the Court of B. R. held that C. was intitled to admission, and that any private agreement between A. and B., not followed up by a surrender, could not give the lord any right to a fine, notwithstanding the presentment of such agreement.

Of the Surrender to Will.

ALTHOUGH this branch of the law of copyhold tenure is materially altered by the act of parlia-

it be in possession, or of a reversionary nature, ante, p. 137-8. And see *Knight* v. *Cooke,* 2 Ch. Ca. 43.

(247) Ante, p. 76.

(248) 2 T. R. 484-5. Vide also Cooke's Bpt. Laws, c. 8. s. 2.

ment of 55 Geo. 3. c. 192. (249), yet I think it proper to go into the subject now proposed for consideration, as much at large as if the act did not exist; not only because it is not retrospective in its operation, but also on account of the second section of the act, which, as it denies the right of admission to any person claiming under a testamentary disposition, except on payment of such stamp duties (250) and fees (251), as would have been payable on the surrender to the use of the will, should induce stewards of manors to recommend the copyhold tenants, to surrender to the uses of their wills as heretofore, leaving the act to operate, (as it would seem to have been intended by the legislature,) in those cases only, where a copyholder cannot conveniently make a surrender of his estate.

It is already shewn, that the legal estate in copyholds can pass only by surrender, unless,

(249) See this act in the Appendix. Vide also post, tit. 'Devise.'

(250) It is rather a curious fact, that no such duties were payable at the time of passing the act now under consideration, the stamp duties imposed by the act of 48 Geo. 3. c. 149, having been repealed by the act of 55 Geo. 3. c. 184; in which latter act, original surrenders out of court, and copies of court roll of surrenders in court, to the uses of a will, are exempted from all stamp duties: vide the above stamp acts in the Appendix.

(251) In many manors a larger fee is payable on a surrender out of court, than for a surrender in court; in those instances a steward would probably think himself intitled to the larger fee, on admission of a devisee under the operation of the above statute.

indeed, under some legislative enactment, or upon a relinquishment of the copyhold to the lord; and it follows, that the will of a copyholder is merely directory or declaratory of the uses of the surrender; but the general terms of a surrender may be restrained by the will (252).

It would seem that copyholds might, by special custom, have been devised without surrender to will, even before the statute of 55 Geo. 3. (253.)

And that a custom preventing a surrender to will, could not be supported (254); such a custom may well, indeed, be thought incapable of support, being in restraint of a right which exists only by custom (255): but as the lord was at liberty to impose such conditions as interest or caprice might dictate, on the original grant of the copyhold estates within his manor, it would be difficult to maintain the right of a testamentary disposition of copyhold lands of inheritance, against a *prescriptive* mode of assurance, which excluded the power of devising thro' the medium of a surrender (256).

(252) 3 Leo. 18. ca. 43. Anon.

(253) *Wrot's* case, P. 35 Eliz. C. B. cited Lit. Rep. 26. Bac. Ab. Cop. (G.) p. 724. marg. *Hills* v. *Hills*, Co. Ent. 124. b. *Smith* v. *Paynton Carter*, 71; and see *Devenish* & *Baines*, 2 Eq. Ca. Abr. 43. but copyholds are, clearly, not within the statutes of wills, ante, p. 105.

(254) By Lord Thurlow in *Pike* v. *White*, 3 Bro. Ch. Rep. 287.

(255) See *Wardell* v. *Wardell*, 3 Bro. Ch. Rep. 116. 4 East, 271. 7 East, 307.

(256) Mr. Belt in his most useful edition of Brown's Chancery Reports, [3d vol. p. 286.], has expressed an inclination of

Stewards of manors, those at least who are well acquainted with their duty, have been careful, in all cases, so to frame the surrender to will, as to embrace any previous general devise which the copyholder should have made; this being essential in order to give effect to the testator's intention, if by his will he has contemplated the disposition, not only of the copyhold property he

opinion similar to that entertained by the author on this point, but has shewn by a very interesting note, that it is, at least, doubtful whether Lord Thurlow laid down any such general proposition, as that attributed to him in *Pike* & *White*. Mr. Evans in his collection of the statutes, 1 vol. pt. 2. Class XI. No. 1, in adverting to that dictum, says, "This "opinion is certainly very con- "ducive to public convenience, "with regard to its effects; "but it seems very difficult to "support it upon the principle "of mere legal reasoning; or "to discover upon what correct "principles a custom according "with the general common "law, and not affected by any "legislative provision, could "be controuled or superseded "by mere judicial authority."

In *Church* v. *Mundy*, see 12 Ves. 426, 15 ib. 396, on the question whether the reversion or vested remainder of a copyhold expectant on an estate tail, could be surrendered to the use of a will, Lord Eldon, C. stated Lord Thurlow's opinion above cited, and said, the court would hold that there might be a surrender to the use of the will, though no instance could be found upon the records of the manor; or if there could be no such custom, there must be some mode of disposition by deed, as in the case of customary freeholds, the want of which [in the case of creditors, &c.] the court would supply. But it is observable, that the point of a prescriptive right in the lord, unfavourable to a testamentary disposition of the copyhold lands, does not appear to have been raised in the latter case. Vide *Wardell* v. *Wardell*, 3 Bro. Ch. Rep. 116. 4 East, 271. 7 East, 307.

then possessed, but of any he should subsequently acquire; for, if the words of the surrender are *future*, that is, if the surrender is to such uses as he *shall* appoint, copyholds purchased by or descended to the testator after the date of his will, even if the devise is in the very general terms of all his real estates, will not pass; but it would seem, that any copyhold estates which the testator possessed at the time of making his will, will pass by such a devise, when the surrender is subsequent to it, although the words of surrender are future (257).

It must also be recollected, that a codicil to a will operates as a republication, so as to bring the will to the date of the codicil, and, consequently, to give effect to a surrender of an estate acquired after the date of the will (258).

And it has long been settled, that after-pur-

(257) *Warde* v. *Warde*, Amb. 299. and see 3 Atk. 178, in *Carte* v. *Carte*. *Spring* d. *Titcher* v. *Biles and another*, 1 T. R. 435. (n. f.) 8 Ves. 285. cites S. C. and also *Sadlier* & *Crespin*, before C. J. Eyre

(258) *Acherley* v. *Vernon*, 9 Mod. 68. S. C. 10 Mod. 518. S. C. Comy. 381. 3 Bro. P. C. 85. *Doe* d. *Pate* v. *Davy*, Cowp. 158. *Doe* d. *Gibbons* v. *Pott*, Dougl. 716. And see *Potter* v. *Potter*, 1 Ves. 437. S. C. 3 Atk. 719. *Gibson* v. *Lord Montfort*, 1 Ves. 489. Belt's Supp. 191. *Jackson* v. *Hurlock*, Amb. 487. *Barnes* v. *Crow*, 4 Bro. Ch. Rep. 2. S. C. 1 Ves. Jun. 486. *Pigott* v. *Waller*, 7 Ves. 98. *Holmes* v. *Coghill*, ib. 505; 12 Ves. 206. *De Bathe* v. *Lord Fingal*, 16 Ves. 167. *Hulme* v. *Heygate*, 1 Meriv. 285. *Goodtitle* d. *Woodhouse and others* v. *Meredith*, 2 Mau. and Sel. 13. These cases have fully settled, that a codicil is, prima facie, a republication of a will, so as to pass after purchased lands, and that it requires a manifest contrary intention, to

chased lands pass by a will containing a description applicable to them, when surrendered to uses *declared* or to be declared by the will of the copyholder (259).

As the lord is only the medium of surrender, a surrender to will does not pass any interest to him, but the lands remain vested in the surrenderor, and may be afterwards surrendered by him to a purchaser or otherwise (260).

The surrender of a feme copyholder being suspended by marriage, she cannot after coverture devise her copyholds pursuant to a surrender made when sole (261).

And as the surrender of a joint tenant operates

repel that effect, as in *Strathmore* v. *Bowes*, 7 T. R. 482. *Bowes* v. *Bowes*, 2 Bos. and Pul. 500. A codicil is also a republication of a will, so as to make a newly purchased estate devised by the codicil, subject to a charge of debts contained in the will. *Rowley* v. *Eyton*, 2 Meriv. 128. But the old cases were unfavourable to the constructive republication of a will, see 7 Ves. 117. et seq. 1 Meriv. 293.

And it is a settled rule, that a codicil will not, by the mere effect of republishing a will, be an execution of a power, unless an intention to execute such power plainly appears. *Holmes* v. *Coghill*, 7 Ves. 499. 12 Ves. 206. *Lane* v. *Wilkins*, 10 East, 241.

(259) *Heylyn* v. *Heylyn*, Cowp. 130. Lofft, 604. *Attorney General* v. *Vigor and others*, 8 Ves. 286. *Denn* d. *Harris* v. *Cutler*, cited *Cowp.* 131, 1 T. R. 438, 8 Ves. 285. And see Sugden's Vend. and Purch. 164. [5th Ed.]

(260) *Fitch* v. *Hockley*, Cro. Eliz. 441-2. 4 Co. 23. a. *Thrustout* d. *Gower* v. *Cunningham*, 2 Sir W. Bl. 1046.; and see *Burgoine* v. *Spurling*, Cro. Car. 283-4. S.C. W. Jones, 396.

(261) *George* d. *Thornbury* v. *Rippon* & *Dawding*, Amb. 627, 473. marg. ante, p. 144.

as a severance (262), it follows, that a surrender by him to the use of his will, and a devise in pursuance of such surrender, will be good, even though the surrender is not presented till after his death (263).

A surrender to will only operates on the interest which the copyholder has at the time, and will not, therefore, pass lands subsequently taken in exchange (264), or a remainder that afterwards descends to a tenant *pur autre vie* (265); but an existing surrender to will has been held to support a devise, so as to include the ultimate remainder or reversion in fee, limited by a subsequent surrender to uses, under which there never had been any admittance (266).

An equity of redemption, until the admission of the mortgagee, is as much the subject of surrender to will, as the land was before the mort-

(262) Ante, p. 151.

(263) *Constable's* case, cited Co. Litt. 59. b. *Porter* v. *Porter*, Cro. Jac. 100. *Allen* v. *Nash*, 1 Brownl. 127. S. C. Noy, 152. *Benson* v. *Scott*, 4 Mod. 254. Lex Cust. 127. *Gale* v. *Gale*, 2 Cox. Ch. Ca. 156. 2 Ves. 609.

(264) *Frank* v. *Standish*, in Scac. cited 1 Bro. Ch. Rep. 588. and 15 Ves. 391.

(265) *Doe* d. *Ibbott* v. *Cowling et ux.* 6 T. R. 63. And see *Goodtitle* d. *Faulkner and others* v. *Morse*, 3 T. R. 365. *Morse* v. *Faulkner*, 1 Anst. 11. and *Doe* d. *Blacksell and others* v. *Tomkins et ux.* 11 East, 185. Vide also n. (d.) 1 Watk. on Cop. 127. [2d Ed.]

(266) *Thrustout* d. *Gower* v. *Cunningham*, ante, p. 272. Fearne's Cont. Rem. 90. *Vawser* & *Jeffery*, 16 Ves. 527. 3 Barn. & Ald. 462. And see *Roe* & *Griffits*, 4 Burr. 1956.

gage (267); but a surrender to will is not necessary in the devise of a trust or equitable estate (268), and, therefore, not in the devise of an equity of redemption, where the mortgagee has been admitted (269).

We will now proceed to a consideration of those cases in which a court of equity, with a due regard to the inviolability of certain moral duties, and in analogy to the aid it affords to a defective execution of a power (270), has supplied the want of a surrender to the uses of a will, and thereby given effect to a manifest or constructive

(267) *Doe* d. *Shewen* v. *Wroot and others*, 5 East, 138-9. n. *Kenebel* v. *Scrafton*, 8 Ves. 30. and see 2 East, 530. *Perry* v. *Whitehead*, 6 Ves. 544. *Floyd* v. *Aldridge & Willis*, cited 5 East, 137. *Wainewright* v. *Elwell*. 1 Mad. Rep. V. C. Court. 627. But see Fearne's P. W. 100.

(268) *Davie* v. *Beardsham et ux.* 1 Ch. Ca. 39. S.C. 3 Ch. Rep. 4. S. C. Nels. Rep. 76. S. C. 2 Freem. 157. 9 Mod. 75. 1 T.R. 601-2. *Ardesoife* v. *Bennet*, 2 Dick. 465. *Greenhill* v. *Greenhill*, 2 Vern. 680. S. C. Gilb. Eq. Rep. 77. S. C. Pre. Ch. 322. *Hawkins* v. *Leigh and others*, 1 Atk. 387. *Macey* v. *Shurmer*, *ib.* 389. *Tuffnell* v. *Page*, 2 Atk. 37. S.C. Barn. 9. *Car* v. *Ellison*, 3 Atk. 75. *Allen* v. *Poulton*, 1 Ves. 121. *Attorney General* v. *Andrews*, 1 Ves. 225. *Gibson* v. *Lord Montfort*, 1 Ves. 489. See also *Wainewright* v. *Elwell*, sup. in which it was decided by the late Vice Chancellor, that an unadmitted devise has no title to devise, even in equity.

(269) *Macnamara* v. *Jones*, 1 Bro. Ch. Rep. 481. *King* v. *King*, 3 P.W. 360. *Strudwicke* v. *Strudwicke*, cited by Mr. Cox, n. (1) *ib.* *Brent* v. *Best*, 1 Vern. 69. *Higate* v. *Higate*, Toth. 142. but see *Andrews* v. *Tuckwell*, Mos. 95.

(270) *Chapman* v. *Gibson*, 3 Bro. Ch. Rep. 230.

intention (271); and which practice, it has been said, originated upon charities under commissions of charitable uses, after the statute of 43 Eliz. c. 4. (272).

This aid is confined to a *wife*, *children*, and *creditors* (273).

AS TO THE WIFE, the reader is referred to *Strode* v. *Falkland*, 3 Ch. Rep. 187-8. *Biscoe* v. *Cartwright*, Gilb. Eq. Rep. 121. *Tollet* v. *Tollet*, 2 P.W. 489. *Hawkins* v. *Leigh and others*, 1 Atk. 388. *Smith* v. *Baker*, ib. 385. *Taylor* v. *Taylor*, ib. 386. 3 Bro. Ch. Rep. 231. *Roome* v. *Roome*, 3 Atk. 181. *Goodwyn* v. *Goodwyn*, 1 Ves. 228. *Byas* v. *Byas*, 2 Ves. 164. *Tudor* v. *Anson*, ib.

(271) A constructive intention is raised in favour of creditors, but in the case of a wife, or of children, the intention must be perfectly manifest. *Sampson* v. *Sampson*, 2 Ves. and Beam. 337. *Byas* v. *Byas*, 2 Ves. 164. Belt's Sup. 315.

(272) *Vide* 3 Ves. 69. A devise to a charity has been considered as a direction to the heir to make a surrender, and good, therefore, as an appointment, under 43 Eliz. *Rivett's* case, Mo. 890. *Duke's* Ch. Us. by Bridgm. 366. And see *Attorney General* v. *Andrews*, 1 Ves. 225. *Attorney General* v. *Sawtell*, 2 Atk. 497. *Harrison* v. *Grosvener*, 2 Keb. 837. Vide also *Attorney General* v. *Downing and others*, Amb. 573. S. C. 1 Dick. 414, wherein the court would not supply the surrender for a charity, as there were prior limitations in strict settlement, even though such limitations had failed. But now as to charitable dispositions of copyhold property, see 9 Geo. 2. c. 36. Ante, p. 248.

(273) It has been refused to legatees. *Rafter* v. *Stock*, 1 Eq. Ca. Abr. 123, pl. 12 : Supp. Vin. Abr. Cop. (M. a.) s. 3. pl. 3. but see *Palmer* v. *Palmer*, 2 Dick. 534, in which case, however, it does not appear by whom the bill was filed.

582. *Marston* v. *Gowan*, 3 Bro. Ch. Rep. 170. *Chapman* v. *Gibson*, ib. 229. N. (1.) to *Watts* v. *Bullas*, 1 P. W. 60. *Rumbold* v. *Rumbold*, 3 Ves. 65. *Hills* v. *Downton*, 5 Ves. 557. *Fielding* v. *Winwood*, 16 Ves. 90.

AS TO CHILDREN:

Vide Smith v. *Ashton*, 1 Ch. Ca. 263-4. *Hardham* v. *Roberts*, 1 Vern. 132, 2 ib. 164. *Kettle* v. *Townsend*, 1 Salk. 187. *Bradley* v. *Bradley et al.* 2 Vern. 163. *Croft* v. *Lyster*, cited ib. 164. *Bath and Mountague*'s case, 3 Ch. Ca. 106. *Baker* v. *Jennings*, 2 Freem. 234. *Pope et al.* v. *Garland*, 3 Salk. 84. *Strode* v. *Falkland*, 3 Ch. Rep. 187-8. *Watts* v. *Bullas*, 1 P. W. 60. and n. (1.) ib. *Bullock* v. *Bullock*, 6 Vin. Cop. M. a. pl. 19. *Burton* v. *Lloyd* or *Floyd*, ib. pl. 20. 2 Br. Par. Ca. 281. 3 P. W. 285. (n. A.) *Weeks* v. *Gore*, 6 Vin. Cop. M. a. pl. 24. *Earl of Suffolk* v. *Howard*, 2 P. W. 178. *Tollet* v. *Tollet*, 2 P. W. 489. *Carter* v. *Carter*, Mos. 370. *Andrews* v. *Waller*, 6 Vin. Cop. W. e. pl. 12. *Hicken et al.* v. *Hicken*, 6 Vin. Cop. M. a. pl. 30. *Cook* v. *Arnham*, 3 P. W. 283. S. C. Ca. Temp. Talb. 35. *Hawkins* v. *Leigh and others*, 1 Atk. 388. *Macey and others* v. *Shurmer*, ib. 389. *Roome* v. *Roome*, 3 Atk. 181. *Goring* v. *Nash and others*, 3 Atk. 191. *Banks* v. *Denshaw and others*, ib. 585. *Goodwyn* v. *Goodwyn*, 1 Ves. 228. *Byas* v. *Byas*, 2 Ves. 164. *Tudor* v. *Anson*, 2 Ves. 582. *Lindopp* v.

Eborall, 3 Bro. Ch. Rep. 188. *Chapman* v. *Gibson, ib.* 229. *Pike* v. *White, ib.* 286. *Rumbold* v. *Rumbold*, 3 Ves. 65. *Hills* v. *Downton*, 5 Ves. 563. *Blunt* v. *Clitherow*, 10 Ves. 589. *Garn* v. *Garn*, 16 Ves. 268. *Pennington* v. *Pennington*, 1 Ves. & Beam. 406. *Sampson* v. *Sampson*, 2 Ves. & Beam. 337.

AS TO CREDITORS:

Vide Cary's Rep. 9, 10. *Pope et al.* v. *Garland*, 3 Salk. 84. *Challis* v. *Casborn*, Gilb. Eq. Rep. 96. S. C. 1 Eq. Ca. Abr. 124. S. C. Pre. Ch. 407. *Strode* v. *Falkland*, 3 Ch. Rep. 187-8. *Drake* v. *Robinson*, 1 P. W. 443. *Harris* v. *Ingledew*, 3 P. W. 98. *Ib.* n. (2). *Haslewood* v. *Pope*, 3 P. W. 322. *Mallabar* v. *Mallabar*, Ca. Temp. Talb. 78. *Attorney General* v. *Mott*, 2 Eq. Ca. Abr. 234, pl. 23. *Car* v. *Ellison*, 3 Atk. 73. *Roome* v. *Roome*, 3 Atk. 181. *Ithell* v. *Beane*, 1 Ves. 215. S. C. 1 Dick. 132. *Byas* v. *Byas*, 2 Ves. 164. *Tudor* v. *Anson, ib.* 582. *Coombes* v. *Gibson*, 1 Br. Ch. Rep. 273. *Bixby* v. *Eley*, 2 Bro. Ch. Rep. 325. S. C. 2 Dick. 698. *Lindopp* v. *Eborall*, 3 Bro. Ch. Rep. 188. *Chapman* v. *Gibson, ib.* 229. N. (1) to *Watts* v. *Bullas*, 1 P. W. 60. *Kentish* v. *Kentish*, 3 Bro. Ch. Rep. 257. *Growcock* v. *Smith*, 2 Cox. Ch. Ca. 397. *Hills* v. *Downton*, 5 Ves. 563. *Kidney* v. *Coussmaker*, 12 Ves. 136. *Pennington* v. *Pennington*, 1 Ves. & Beam. 406.

And I shall shew, under the section of devise, that a court of equity will supply the want of a surrender for creditors, even where there are freeholds, if the freeholds are insufficient for payment of the debts, but not when the freeholds are adequate (274).

Where the equity is equally balanced, the court does not interpose, so that a surrender will not be supplied against the customary heir, being a child of the testator, unless such heir is provided for; but a provision made for him, either by the parent or *aliunde*, brings him within the rule, without regard to the amount of such provision (275).

This, at least, was considered to be the established practice of the Court of Chancery, until

(274) But the aid would be confined to the amount of the debts, if the estate were devised to a person not within the above rule. 1 Watk. on Cop. 141. Belt's ed. of Brown's Ch. Rep. 3d vol. 171. n. Supp. Vin. Abr. Cop. (M. a.) s. 3. pl. 3.

(275) *Kettle* v. *Townsend*, 1 Salk. 187. 1 Eq. Ca. Abr. 123. 3 Bro. Ch. R. 231. *Biscoe* v. *Cartwright*, Gilb. Eq. Rep. 121. *Andrews* v. *Waller*, 6 Vin. Cop. (W. e.) pl. 12. *Hicken et al.* v. *Hicken*, *ib.* (M. a.) pl. 30. *Strode* v. *Falkland*, 3 Ch. Rep. 188. *Cook* v. *Arnham*, 3 P. W. 283. S. C. Ca. Temp. Talbot, 35. *Smith* v. *Baker*, 1 Atk. 386. *Hawkins* v. *Leigh and others*, *ib.* 388. *Macey and others* v. *Shurmer*, ib. 390. *Chapman* v. *Gibson*, 3 Bro. Ch. Rep. 229. *Pike* v. *White*, *ib.* 288. *Cooper* v. *Cooper*, 2 Vern. 265. Where the elder brother had been in possession 20 years, by consent of the plaintiff, (a younger brother who was well provided for,) the bill to have a surrender supplied was dismissed with costs, *James* v. *James*, 6 Vin. Cop. M. a. pl. 12. 1 Eq. Ca. Abr. 123.

the case of *Hills* v. *Downton* (276), in which Lord Rosslyn (Chancellor) observed, that the distinction as to the consideration of the state of the family, had been for the last twenty years completely laid out of the question, and that if attention were to be paid to the situation at all, it must be, whether there was a provision by the will: but that he could not conceive a rule, that set you to seek into the circumstances of the heir at law.

The inconvenience of the exception to the above rule in favour of the heir at law, if a child of the testator, evidently appears to have been felt by Lord Alvanley, in the above case of *Chapman* & *Gibson;* but in his observations on the case of *Hills* & *Downton*, which will be found in the Appendix to Mr. Sugden's Treatise on Powers, he declared, that if the case of a son, wholly unprovided for, were to come before him, he should hesitate, notwithstanding the great authority of the Lord Chancellor, to make a decree against him.

I am not aware of any recent authority expressly deciding the point, upon which we have seen there was a difference of opinion between Lord Rosslyn and Lord Alvanley, except that of *Rodgers* v. *Marshall* (277), wherein the Master of the Rolls adopted the opinion of Lord Alvan-

(276) 5 Ves. 557.

(277) 17 Ves. 294. And see *Fielding* v. *Winwood*, 16 Ves. 90. *Garn* v. *Garn*, ib. 268. Belt's Ed. of Bro. Ch. Rep. 3 vol. 229. n. 2.

ley, holding, that, even as against a grand-child, the want of a surrender ought not to be supplied, unless he had a provision in some other way. I have before shewn that this was the case of an informal conveyance of a copyhold for a younger son, and that an inquiry was directed, whether the defendant had a provision, and as to the nature and extent of it (278).

All the authorities seem, however, to agree, that it is of no consequence whether the provision comes from the parent or not, and that if the son has a provision, it is immaterial how ample or scanty it may be, the parent being the best judge as to the *quantum* of the provision (279); yet, I apprehend, it must not be merely illusive (280).

But a distant heir is within the rule, that a surrender is to be supplied, though totally unprovided for; the same natural or moral obligation, as between a parent and child, not applying in those cases: therefore, in the above case of *Chapman* & *Gibson*, a surrender was supplied in favour of a wife against the customary heirs,

(278) *Ante*, p. 263-4.

(279) *Goring* v. *Nash*, 3 Atk. 191. 3 Bro. Ch. Rep. 230. *Kettle* v. *Townsend*, 1 Salk. 187. *Cook* v. *Arnham*, 3 P. W. 284.

(280) *Hicken et al.* v. *Hicken*, 6 Vin. Cop. (M. a.) pl. 30. *Andrews* v. *Waller*, ib. (W. e.) pl. 12. *Boss* v. *Boss*, ib. S. C. (called *Ross* v. *Ross*). 1 Eq. Ca. Abr. 124. Mr. Watkins was of opinion, that what the heir had acquired, or was acquiring, by his own industry, could not be considered as a provision. See 1 vol. on Cop. 135. n. h. [2d Ed.]

a nephew and niece, without regard to any provision made for such heirs (281).

And in *Fielding* v. *Winwood* (282), the equity of the wife prevailed against the collateral heir, without any consideration as to the latter having a provision or not.

Equity in aiding a devise in favour of a wife or children, where there is clear evidence of an intention to pass copyholds, does not regard the circumstance of the wife or children being otherwise provided for (283).

And the want of a surrender will be supplied for a wife or child having a limited interest, although the persons in remainder are not within the rule; so where there was a devise to trustees to sell, and the interest of the produce of sale to be paid to the wife for life, and after her decease, the principal to be paid to the children of the testator's sisters; the Lord Chancellor ordered the copyholds to be sold, the wife to have the interest of the purchase money for her life, and then the money to result to the customary heirs (284).

(281) See Belt's Ed. Bro. Ch. Rep. 3 Vol. 229. n. 2 & 3.

(282) 16 Ves. 90. *Vide* also *Smith* v. *Baker*, 1 Atk. 385. *Taylor* v. *Taylor*, ib. 386. 3 Bro. Ch. R. 231. N. (1.) to *Watts* & *Bullas*, 1 P. W. 60.

(283) *Kettle* & *Townsend*, 1 Salk. 187. *Carter* v. *Carter*, Mose. 365. *Baker* v. *Jennings*, 2 Freem. 234. *Burton* v. *Lloyd or Floyd*, ante, p. 276. *Weeks* v. *Gore*, 6 Vin. Cop. M. a. pl. 24. *Andrews* v. *Waller*, ante p. 280. *Cook* v. *Arnham*, Ca. Temp. Talb. 37. *Tudor* v. *Anson*, 2 Ves. 582. *Smith* v. *Baker*, sup. *Goring* v. *Nash*, 3 Atk. 191.

(284) *Marston* v. *Gowan*, 3 Bro. Ch. Rep. 170.

And where the heir was not wholly unprovided for, equity supplied the want of a surrender in favour of a second son, although the devise was in remainder expectant on the decease and failure of issue of the testator's heir, and though other provision was made by the will for such second son (285).

The above rule, founded on the best principles of equity and justice, is equally applicable to lands of gavelkind and borough English tenure (286).

In the case of *Kettle* & *Townsend* (287), Lord Somers decided, that a surrender ought to be supplied in favour of a grandchild, but his decree was afterwards reversed in the House of Lords; yet we find, that in *Watts* v. *Bullas* (288), the Master of the Rolls thought, that the surrender ought to be supplied for a grandchild, and that it would be so ruled, if the question were again to come before the House of Lords; and both Lord Harcourt (289), and Lord Cowper (290) disapproved of the decision in the Lords.

(285) *Cook* v. *Arnham*, 3 P. W. 285-6. And see *Goring* v. *Nash*, 3 Atk. 191-2.

(286) *Bradley* v. *Bradley et al.* 2 Vern. 165, in which Lord Commissioner Hutchins said, "there ought not to be one sort of equity for an eldest, and another for a younger son." And see *Cooper* v. *Cooper*, 2 Vern. 265. *Byas* v. *Byas*, 2 Ves. 164.

(287) 1 Salk. 187. 1 Eq. Ca. Abr. 123. 10 Mod. 471. 2 Vern. 625.

(288) 1 P. W. 61.

(289) *Freestone* & *Rant*, 1 P. W. 61. (n. †.)

(290) *Fursaker* v. *Robinson*, Gilb. Eq. Rep. 139. S. C. Pre-Ch. 475. 1 Eq. Ca. Abr. 123. pl. 9.

In *Hills* & *Downton* (291), Lord Rosslyn also expressed his dissatisfaction with the determination of the House of Lords, which reversed Lord Somers's decree, that a surrender might be supplied for a grandchild, and doubted the authority of the note in Salkeld, and, (as he said,) the only other authority, a decree of the lords commissioners.

But the question between a grandchild and the heir at law was again agitated (not long after the decision of *Hills* & *Downton*) in the case of *Perry* v. *Whitehead* (292). The bill was filed by five grand-daughters, devisees, stating that the copyhold premises having been surrendered by the testatrix upon mortgage, no surrender was necessary to the use of her will, (but it is to be observed, that the mortgagee was not admitted, and consequently a surrender was requisite,) and that if it were necessary, the want of it ought to be supplied in equity. The counsel for the plaintiff relied on the above cases of *Hills* & *Downton*, *Chapman* & *Gibson*, *Watts* & *Bullas*, and *Fursaker*

(291) 5 Ves. 563. and see Anon. 2 Freem. 197. *Chapman* & *Gibson*, 3 Bro. Ch. Rep. 231. 3 Ves. 12. *Vide* also *Allen* v. *Poulton*, 1 Ves. 121. where it was objected, that the defect of a surrender should not be supplied for a grandchild; but the Master of the Rolls held, that the copyhold was well devised to a grandson, on the ground, that a person claiming under the will, must admit the whole.

(292) 6 Ves. 544. and see *Elton* v. *Elton*, 3 Atk. 508. S.C. 1 Wils. 161. *Goodwyn* v. *Goodwyn*, 1 Ves. 228. *Tudor* v. *Anson*, 2 Ves. 582. 2 Fonbl. on Eq. 123. 12 Ves. 210. Ante, p. 263-4.

& *Robinson*, and Anon. 2 Freeman, 197: but my Lord Chancellor Eldon, (stopping the counsel for the defendant, and in opposition to the argument urged, that there was a moral obligation from a grandfather towards his grandchild,) observed, that where a legacy is given to a grandchild, in order to carry interest, there must be something more than merely giving the legacy, something shewing that the testator put himself *in loco parentis* (293); and held, that the rule laid down by the House of Lords, could not be reversed in a court of equity, but must remain till altered by the house: he therefore dismissed the bill, but said it was impossible to give costs where the plaintiffs had so much encouragement from *dicta*.

It has been long established, that the surrender to will shall not be supplied in favour of natural children (294), or of a brother or sister, or any collaterals (295), or of strangers or volunteers,

(293) In this case the Lord Chancellor further observed, "The case of a grandchild, where the father is alive, and abundantly providing for it, is very different from the case where the father is dead. As to the statute of *Elizabeth*, if the father is living, the grandfather is under no legal obligation." And see *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

(294) *Tudor* v. *Anson*, 2 Ves. 582. *Crickett* v. *Dolby*, 3 Ves. 12.; and see *Fursaker* v. *Robinson*, ante p. 282. 12 Ves. 209. in *Holmes* & *Coghill*. Fearne's P. W. 328.

(295) *Goodwyn* v. *Goodwyn*, 1 Ves. 228. *Strode* v. *Falkland et al.* 3 Ch. Rep. 169. S. C. 2 Vern. 625. *Marston* v. *Gowan*, 3 Bro. Ch. Rep. 169. And see *Trodd* v. *Downs*, 2 Atk. 304. S. C. (*Rogers* v. *Downs*) 9 Mod. 292. [5th Ed.] *Judd* v. *Pratt*, 13 Ves. 168, 15 Ves. 390.

as a legatee or devisee not being a wife or child (296).

But length of possession, we have seen, will create a presumption of a surrender to will having been made, where the court rolls are lost (297).

Of Presentment of the Surrender.

WHEN a surrender is taken out of court, it should be brought at the next court held for the manor, for the purpose of being presented by the homage, and entered by the steward upon the court rolls; and, by the custom of some manors, such surrender is void, unless it be presented at the first court after it is made (298), or after the

(296) *Strode* v. *Falkland*, ante, p. 284. *Floyd* v. *Aldridge* & *Willis*, cited 5 East, 137. And see 1 Madd. Rep. V.C. Court, 631, 632-3, in *Wainewright* v. *Elwell*. Ante, p. 263.

(297) *Lyford* v. *Coward*, *Knight* v. *Adamson*, ante, p. 266; and see *Cookes* v. *Hellier*, 1 Ves. 234.

(298) Co. Litt. 62. a. See *Burgoyne* v. *Spurling*, Cro. Car. 273, 283-4. S.C. Sir W. Jo. 306, in which case A. had surrendered into the hands of customary tenants to the use of B. in fee on condition to be void if A. paid B. a certain sum on the 1st of July following, and afterwards, before payment of the money, A. surrendered by the hands of customary tenants to C. in fee, and then paid the money according to the condition, and surrendered in like manner to D. in fee, and the surrender to D. was presented at the next Court, and subsequently, at the same Court, the surrender to C. was presented, but the additional surrender to B. was not presented; And it

death of the copyholder, when it is a surrender to will; and the custom in other manors is, that the surrender should be presented at some court within a year after the surrender is made, or at the next court holden after the year (299), though in other manors, it may be presented at a second or any subsequent court (300): and it would seem, that, even without a special custom, a surrender to will may be presented at the next court after the death of the surrenderor (301), even in the case of a surrender by a joint tenant in fee (302).

The surrender, and, indeed, every other document connected with the copyholder's title, on being presented in court, should be indorsed with these words, "presented and inrolled at a court "held for the manor of———— the —— day

was adjudged that C. should have the land. Vide also Anon. Godb. 268. pl. 372. *Frosel* or *Froswell* v. *Welsh*, Cro. Jac. 403. S. C. 3 Bulst. 214. S. C. Bridgm. 49. S. C. 1 Roll Rep. 415. S. C. Godb. 268.

(299) *Taylor* v. *Wheeler*, 2 Vern. 565. *Perryman's* case, 5 Co. 84. S. C. (*Parman* & *Bowyer*), Cro. Eliz. 668. S. C. (*Pereman* & *Bower*), 2 And. 125; Supp. Co. Cop. s. 19. Tr. 209. Carter, 73. Com. Dig. Cop. (F. 9 & 10). And this custom extends in some manors to conveyances of freehold lands, *Perryman's* case, sup. Co. Litt. 59. b.

(300) Co. Cop. s. 40. Tr. 88. Gilb. Ten. 280. 2 Bl. Com. 369. *Fawcet* v. *Lowther*, 2 Ves. 302. *Moore* v. *Moore*, ib. 602. *Mitchel* v. *Neale*, ib. 680; and see *Bunting's* case, 4 Co. 29. b. 6 Vin. Cop. (U. a.) (W. a.) (X. a.)

(301) *Carpender* & *Ilton*, *Stint* & *Blount*, cited Com. Dig. Cop. (F. 10.) Co. Litt. 62. a.

(302) Ante, p. 272-3.

"of ———." And this indorsement should be undersigned by at least two of the homage.

If the surrender be taken out of court by the lord or steward, it is brought into court with the rolls of the manor, as a matter of course, but when it is taken by a tenant or tenants, or the bailiff of the manor, under a special custom, it should be brought into court by the persons or person who took it (303), yet we have seen, that the death of the persons taking the surrender, or of the surrenderor or surrenderee, or both of them, will not vitiate it (304); and as the surrender is produced, I conceive, for the purpose only of being presented by the homage of the particular court, it does not seem to be essential, that the persons taking it should attend, though living (305), if the court be satisfied that the surrender was made (306), and the lord or steward will dispense with such attendance, and admit the surrenderee.

The presentment should, in all material points, correspond with the surrender, as any variance would certainly be fatal, if the surrender were not

(303) Co. Cop. s. 40. Tr. 88-9; where it is said, 'if the steward, the bailiff, or the tenants, into whose hands the surrender is made, refuse to present, upon a petition or a bill exhibited in the lord's court, the party grieved shall find remedy. But if the lord will not do him right, he may both sue the lord and them that took the surrender, in the Chancery, and shall there find relief.'

(304) Ante, p. 154.

(305) Except by special custom, 3 Bulst. 218.

(306) Co. Cop. s. 40. Tr. 89.

taken by the lord or steward, and the lord had no knowledge of the true surrender previous to the admittance; and would create a question upon the title, although the precise terms of a surrender, taken by the tenants or bailiff of the manor, were known to the lord at the time of admission, nay even if the surrender were taken by the lord himself or his steward.

But I am about to shew, that doubts are entertained of the necessity of a presentment of the surrender of copyhold lands, when such surrender is taken by the lord or steward, and, consequently, whether the admittance, in such cases, will not be good, although the presentment does not correspond with the terms of the surrender.

My Lord Coke says(307), "If a copyholder "will surrender in court to the use of a stranger, "besides the surrender, the admittance is requi- "site: and, if the surrender be made out of court "into the hands of *the lord himself*, which the ge- "neral custom will warrant, or into the hands of "the bailiff, or two tenants of the manor, which "by special custom only is warrantable: besides "a surrender, two other ceremonies are requisite; "the one, a true presentment of the surrender in "court by the same persons into whose hands the "surrender was made; the other is an admittance "of the lord according to the effect and tenor "both of the surrender and presentment."

We have here, therefore, I submit, an autho-

(307) Co. Cop. s. 38. Tr. 85-6.

rity, not only that a surrender, even when taken by the lord himself, must be presented in court, but that it must be truly presented.

Lord Coke adds (308), "If the surrender be "conditional, and the presentment be absolute, "both the surrender, presentment, and admit- "tance thereupon, are wholly void: but, if the "conditional surrender be presented, and the "steward, in entering of it, omitteth the condi- "tion; yet, upon sufficient proof made in court, "the surrender shall not be avoided, but the roll "amended; and this shall be no conclusion to "the party, to plead or give in evidence, the "truth of the matter."

And again he says (309), "If the *steward*, the "bailiff, or the tenants, into whose hands the sur- "render is made, *refuse to present*, upon a petition "or a bill exhibited in the lord's court, the party "grieved shall find remedy. But, if the lord will "not *do him right*, he may both sue the lord and "them that took the surrender in the Chancery, "and shall there find relief." So that we have here a further authority, I conceive, that the surrender should be presented, though taken by the lord or steward.

The late Chief Baron Gilbert considered the presentment of a surrender as of no other importance, than to inform the lord of the manor of the contents of it. He says (310), "It seems that the

(308) Co. Cop. s. 40 Tr. 88-9. ante p. 287. (n. 303.)
(309) Co. Cop. s. 40. Tr. 89. (310) Ten. p. 278-9.

" presentment of a surrender in court, is only by " way of instruction, to let the lord know of the " surrender, and, accordingly, he may admit; for " it is apparent, that a presentment is not of ne- " cessity, because the lord may admit out of " court; and any act of the lord's consenting to " the surrender will amount to an admittance, " which plainly shews, that a presentment is only " to shew there was such a surrender; for, if it " were of necessity, then there could be no ad- " mittance out of court, nor no act implying the " lord's consent, would be *tantamount* to an ad- " admittance; and then, if we go to the reason " of the thing, since the estate is only to be sur- " rendered to the lord, and by him transferred " to the surrenderee, if he accept the surrender, " and grant an admittance, which is all that can " be done, what need is there of a presentment, " and of what use can it be for the homage to " present a surrender, in order for the lord's ad- " mittance, when the lord may take notice that " there was such a surrender, accept it, and ad- " mit accordingly? the estate, as it was derived " from the lord, so it must be surrendered to him, " *and the presentment makes no part either of the* " *surrender or admittance.* In itself, it is nothing " but a notification, that there was such a surren- " der, which, if the lord takes notice of, without a " presentment, it frustrates the end of a present- " ment, and the presentment is in no ways of use. " Therefore it seems, that, if a surrender be made,

" and then a wrong presentment be made of this " surrender, and then admittance is made accord- " ing to the surrender, that this is good; for only " the presentment can be void, and then there is " an admittance upon a surrender, without any " presentment, which, for the reasons above, seems " to be very good. It is said in *Lex Cust.* 137. " that a surrender must be presented by the same " persons that took it. So says *Coke;* but, that " this is not literally true, will appear from what " he says in another place, that, if he that took the " surrender, die, yet if presentment be made of " it, it is sufficient; and it is said in *Lex Cust.* to " have been held by *Wadham Windham*, that if a " surrender be made to one tenant, and pre- " sented to have been made to another, yet, that " is nothing to vitiate the surrender; if the sur- " render be presented by any body, and admit- " tance thereupon made, it seems to be well " enough; for it is known, that there was a sur- " render; and, if the presentment should be void, " yet the admittance is good enough without it."

And, in another place (311), the learned Chief Baron thus expresses himself:—

" My Lord Coke says, that presentments of sur- " renders ought, in all material points, to ensue " and agree with the surrenders themselves, (Co. " Cop. s. 40.) else the surrender, presentment, " and admittance thereupon, will be void; which " seems reasonable; for, if the presentment, in

(311) Ten. p. 336.

" matter, differs from the surrender, the lord hath
" no sufficient notice of the surrender; and then
" the admittance upon it must, in reason, be bad,
" and, not help out the presentment; for, if the
" lord knew the true surrender, perhaps he would
" never consent to such a surrender; and the true
" surrender ought to be known, that the lord
" might know his tenant, and from whom to take
" his services. The admittance cannot help out,
" for that was grounded upon the presentment;
" but, if the lord had notice of the true surrender,
" though the presentment did differ, yet it seems
" reasonable the admittance should enure accord-
" ing to the surrender, because he had notice of
" the true surrender; and, when a man is ad-
" mitted, he is in by the surrender. *Sed 'quære,*
" where it is said, that if the presentment differ in
" points material, from the surrender, that there
" the admittance, presentment, and surrender, are
" all void: it seems this must be understood, if
" the time for presenting the surrender be past, for
" if there should be a presentment and admittance
" made contrary to the surrender, sure this will
" not make the surrender void, before the utmost
" time allowed by law for the surrender's being
" presented; for it is no reason to say, that, be-
" cause the presentment is void, that therefore the
" surrender is void; for the surrender depend, not
" on the presentment, though it may be void be-
" cause not presented, but not because ill pre-
" sented. So that if, after such ill presentment

" and admittance, there should be a good pre-
" sentment and admittance, it seems the surren-
" der and all the other acts will stand good."

Mr. J. Blackstone adopts the opinion of Lord Coke, and says (312), the surrender is to be brought into court by the same persons that took it, and then to be presented *by the homage;* and, in all points material, must correspond with the true tenor of the surrender itself. The learned Judge adds, " And, therefore, if the surrender be " conditional, and the presentment be absolute, " both the surrender, presentment, and admit-
" tance thereupon, are wholly void (Co. Cop. 40.): " *the surrender, as being never truly presented; the* " *presentment, as being false; and the admittance,* " *as being founded on such untrue presentment.*"

Mr. Watkins, on the question of the necessity of a presentment of the surrender in all cases, observes (313):

" When a surrender is made out of court into " the hands of any who cannot thereupon make " an admittance, or, if no admittance be imme-
" diately made by a person enabled to admit, such " surrender should be regularly presented.

" From the general terms in which the neces-
" sity of a presentment of a surrender made out " of court, is asserted, in many of our books, it " seems to have been too often inferred, that such " presentment is equally requisite, into whose " hands soever the surrender is made.

(312) 2 Bl. Com. 369. (313) 1 Vol. on Cop. p. 79.

"It is said in Calthorpe, that, if the lord, "having copyhold lands surrendered into his "hands, will, in the presence of his tenants out "of court, grant the same to another; and the "steward enter the same into the court book, "and make thereof a copy to the grantee; and "the lord die before the next court; it will be "no good copy to hold the land.

"But," continues Mr. Watkins, "it must be "evident, from the reason of the thing, as well "from the weightier testimony of other writers, "that the presentment is only for the information "of the lord, to apprise him that such surrender "has been made.

"To what purpose can it be to make known to "the lord, that such surrender was made, when "the lord knows it already. Why declare to him "that it was taken, when he must be conscious "that he had taken it himself? Besides, who is "to present a surrender taken by the lord? The "lord may take a surrender without the presence "of a tenant. Is the lord to present it himself? "But to whom is he to present it? Whom is he "to inform of the event? He cannot present it "to himself; and he is not obliged to say any "thing about the matter to his tenants. When "the lord, therefore, takes a surrender out of "court, he may admit without any presentment.

"The same reasoning holds equally good as to "the steward, in cases where the surrender is only "the mean of conveyance. He may accept such

" surrender and immediately admit the *cestuy que* " *use.* It is clear, that many of the books, when " speaking of the necessity of a presentment, in " case of a surrender being made *to the lord* out " of court, mean only a surrender made out of " court to the lord *by the hands of tenants*, or of " those of the bailiff or reeve."

It must be apparent to the reader, that the above authorities open a large field for doubt, as to the importance to be attached to the presentment of a surrender as an integral part of the copyhold assurance, particularly when it is taken by the lord or steward, but as the lord may be compelled to admit the surrenderee, and as the presentment and inrolment of the surrender serve as evidence of the copyholder's title, it may be urged, that the presentment of a surrender is not so much for the information of the lord, as a part of the requisite adjudication of facts by the homage, leading to the inrolment of the surrender upon the court rolls of the manor, by a copy whereof the tenant holds his estate.

It is well known to every practical man, that not only the surrenders made out of court, but also the surrenders, and every other act done in court, are included in the presentment or verdict of the homage, and would (with the exception of any licenses or grants by the lord in respect of his freehold interest,) seem to receive their effect by being put upon the rolls, under the sanction of such presentment or verdict; and it is, at

least, contrary to all practice, for the lord or steward to inrol any act, which is done by them, ministerially only, out of court, before such act has been presented in court by the homage; and, if the practice is founded in necessity, then the copyholder's title is incompleat, *in all cases*, until the surrender has been presented and inrolled at a court held for the manor.

And a copyholder, it must be recollected, holds not only at the will of the lord, *secundum consuetudinem manerii*, but also *by copy of court roll;* must not his title, therefore, be incompleat, until he can be put into possession of a copy of the surrender, and of the admittance thereupon, from the rolls of the manor, as recorded at some court held for the manor, under the verdict or presentment of the homage?

The necessity of a presentment of the surrender, and, indeed, of an admittance out of court by the lord or steward, (if that is allowable, but of which I have before ventured to express considerable doubts, particularly with respect to the steward) (314), is somewhat sanctioned by Mr. Watkins himself, who says (315): "But, if "the surrender be taken out of court by the lord "or the steward, personally, and no immediate "admission be made, the memorandum of the "taking of such surrender, signed by the te- "nant who surrenders, and the lord or the stew- "ard taking it, *should be certified and produced*,

(314) *Ante*, p. p. 122-9. (315) 1 Vol. on Cop. p. 81.

" on admittance being requested at a future time,
" from the lord if the steward had taken it, or
" from the steward, if taken by the lord."

And he adds, " If admittance be immediately
" made by the lord or steward taking such sur-
" render, yet such admittance should be regu-
" larly notified at the next court day, *for the in-*
" *formation of the tenants.* This, too, was more
" immediately necessary in ancient days, as, in
" case the tenants should have known any objec-
" tions to the person so admitted, of which the
" lord might have been ignorant, they might have
" informed him of them; from which he might
" have been induced to resume the estate, as
" having conferred it on a person who was un-
" worthy of the grant. Add to this, *that it must*
" *be regularly inserted on the court rolls of the*
" *manor, by a copy of which he is to hold.*"

The case of *Kite* & *Queinton* (316) has clearly established the position of Mr. J. Blackstone, that an admittance is void, when founded on an untrue presentment of a surrender, if such surrender be taken by the tenants or bailiff of the manor; for there the surrender, (which was taken by copyhold tenants,) was on certain conditions, and, at the next court, the surrender was presented; but, in the presentment, the conditions were omitted, and he, to whose use the surrender was made, being dead, the lord, by the steward, admitted his daughters and heirs, who entered; the

(316) 4 Co. 25. a.

surrenderor released to the daughters being in possession, and afterwards entered upon them; and the Court held, that the right was in the surrenderor, even after the admittance of the daughters, which right was extinguished by the release.

If, indeed, as it has been said (317), the presentment of the surrender is only for the information of the lord, then, when the lord or his steward has positive notice of the exact terms of the surrender, (which must be the case when such lord or steward took the surrender himself,) or, when notice of the precise terms of such surrender previous to admission, could be proved upon the admitting lord or steward, the presentment of the surrender, in whatever form or words, may perhaps be considered as a presentment of it in the very terms of the instrument; or, at least, it may be thought, that the variance in the presentment, is an error in form, capable of correction, and which ought not to operate to the prejudice of the surrenderee.

Whatever may be adjudged hereafter to be the effect of the want of presentment, or of an ill presentment of the surrender, with reference to the question of title, when such surrender is taken by the lord or steward, or when the terms of the surrender are known to the lord or his steward before he admits the surrenderee, it is clear, and should not be forgotten, if the question be ever

(317) See *East* & *Harding*, Cro. Eliz. 499.

agitated, that the presentment and proclamation on death, are not merely for the information of the lord, but also to give notice to those who have a right to be admitted, that the tenancy has become vacant (318).

If a copyholder contracts to surrender his copyhold land, and afterwards surrenders by the hands of two tenants, pursuant to a custom of that nature, it will be a good performance of the contract (319): But it was decided, in the case of *Shann* & *Shann* (320), that a surrender into the hands of a tenant of the manor, pursuant to a custom, did not satisfy a contract to surrender, so as to ground an action for recovery of the consideration money, the Court holding, that the surrender was not effectual until presented at the court.

When the surrender is to the lord's own use, the copyhold interest vests in him without presentment, although he is tenant for life only (321); but it is to be recollected, that this operates as a relinquishment of the copyhold, and that

(318) *Doe* d. *Whitbread* v. *Jenney*, 5 East, 522-32.

(319) *Page* & *Smith*, Holt, 161; 3 Salk. 100. Hard. 293. *Beany* v. *Turner*, 1 Lev. 293. S.C. 1 Mod. 62. S.C. 2 Keb. 666.

(320) Sty. 256. and see *Shann* v. *Bilby*, ib. 280. In the case of *Vaughan* & *Atkins*, 5 Burr. 2785, Lord Mansfield said 'the surrender is a complete execution of the contract as between the vendor and vendee;' and see *Page* & *Smith*, *Beany* & *Turner*, sup.

(321) See *St. Paul* v. *Viscount Dudley and Ward*, 15 Ves. 167. ante, p. 43-4.

any other assurance would equally answer the purpose.

Wherever a court of equity will supply the want of a surrender, it will, of course, relieve against an ill presentment, or the want of a timely presentment of the surrender (322).

When the custom of the manor is general, that all surrenders are void if not presented within a definite period, there seems every reason to suppose, that a surrender taken by the lord or steward, would be void at law, equally with a surrender taken by the tenants of the manor; and that it would not be saved by the lord's neglect of convening a court, as the surrenderor might have procured a court to be held (323): But if there is no prescribed time, within which the surrenders must be presented, then, I apprehend, a surrender, whether taken by the lord or steward, or by the bailiff or tenants, or otherwise, according to the custom of the manor, may be presented at any period, although it would be void for want of presentment, as against a subsequent purchaser, without notice, who should have pro-

(322) *Portman* v. *Seymour*, 9 Mod. 280. [5th Ed.] *Jennings* v. *Moore and others*, 2 Vern. 609. *Blenkarne* & *Jennens*, 2 Bro. Par. Ca. 278. *Burton* v. *Lloyd* or *Floyd*, 6 Vin. Cop. (M. a.) pl. 20. 2 Bro. Par. Ca. 281. 3 P. W. 285. n. (A.) *Taylor* v. *Wheeler*, 2 Vern. 564. S. C. 2 Salk. 449. 2 Ves. 633. 10 Mod. 492. *Martin* v. *Seamore*, 1 Ch. Ca. 170. Ante, p. 263, 274 et seq.

(323) *Smith* v. *Paynton*, Cart. 73-5. and see Cro. Jac. 403 in *Frosel* & *Welsh*.

cured the surrender to him to be presented and inrolled.

If a court should be attended by two copyholders only, one of whom had surrendered all or part of his copyholds to the use of a purchaser or mortgagee, (who was desirous of being admitted,) such surrender having been taken by tenants or the bailiff of the manor, pursuant to an established custom, and therefore, (without doubt,) requiring to be presented; a question would arise, whether the presentment of the surrender by such two homagers would be good: there is not, I believe, any authority on this point, but upon the occurrence of a similar case within my knowledge, the better opinion of the profession seemed to be, that a copyholder is not precluded from acting as a homager in giving effect to a transfer of his own estate.

Of Devise.

A WILL of copyholds is only in the nature of an appointment or declaration of the uses, pursuant to the power created by the surrender (324),

(324) Ante, p. 198. In the case of *Brodie* v. *Barry*, 2 Ves. & Beam. 133, the late Master of the Rolls drew an analogy between a devise of copyholds in England, and a will of land in Scotland; observing, that a will of copyholds operated as a declaration of the uses of the surrender, and that if in Scot-

and need not be attested as required by the 5th section of the statute of frauds (325), which is confined to such estates as pass by the statute of wills (326); but if a copyholder, by his surrender to will, imposes upon himself any certain mode of attestation, the copyholds will not pass, unless the formalities required are complied with in the execution of the will (327): yet, under particular circumstances, a court of equity will aid a defective execution of the power, as in freehold cases (328).

land there be a conveyance previously executed according to the proper feudal forms, the party might by will declare the use and trust, to which it should enure.

(325) 29 Car. 2. c. 3. It is to be lamented that the protection of the provisions of the statute of frauds, had not been extended to copyholds, by the act of 55 Geo. 3. c. 192, under which a copyholder may now devise his estate by an unattested will, without the form of a previous surrender to the uses thereof, ante, p. 268.

(326) 34 & 35 H. 8. c. 5. 3 Lev. 79. 2 Keb. 128. *Semaine* v. ——, 1 Bulst. 200. *Attorney General* v. *Barnes et ux.* 2 Vern. 598. *Tuffnell* v. *Page*, 2 Atk. 37. S.C. Barn. 9. *Attorney General* v. *Sawtell*, 2 Atk. 497. *Attorney General* v. *Andrews*, 1 Ves. 225. *Wagstaff* v. *Wagstaff*, 2 P.W. 258. *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. 77. *Roe* d. *Gilman* v. *Heyhoe*, 2 Sir W. Bl. 1114. *Carey* v. *Askew*, Belt's Bro. Ch. Rep. 2 Vol. p. 58. S.C. 1 Cox. Ch. Ca. 241. *Habergham* v. *Vincent*, 2 Ves. Jun. 229. S.C. 4 Bro. Ch. Rep. 353. Harg. & But. Co. Litt. 111. b. N. (1.) and (3.) 2 Wils. 16. *Doe* d. *Cook* v. *Danvers*, 7 East. 322. 2 Esp. N.P. 467. *Appleyard* v. *Wood*, Sel. Ca. Temp. King. 42.

(327) *Godwin* v. *Kilsha*, Amb. 684. And see 2 Ves. Jun. 216.

(328) *Tollet* v. *Tollet*, 2 P.W. 489. *Cotter* v. *Layer*, ib. 623. Mountague & Bath, Sel. Ca. Ch. 55, 2 Ch. Rep. 417. *Hervey* v. *Hervey*, 1 Atk. 563.

Where a copyholder had made his will, which was attested by three witnesses, and afterwards caused such will to be altered, by striking out several devises, and a memorandum to be written that he had examined, perused, and approved, of the will so altered, but did not republish it in the presence of three witnesses, but directed it to be written out fairly, and became delirious before it was returned, it was held to be a good will, and a surrender was decreed accordingly (329).

In *Roe* d. *Gilman* v. *Heyhoe* (330), a will in the testator's own handwriting, without seal or witnesses, was adjudged to be sufficient to pass a copyhold estate previously surrendered to the uses of his will.

And in *Carey* v. *Askew* (331), the Master of the Rolls said, it had been held, that any will received by the ecclesiastical court, was sufficient to govern the surrender of a copyhold; and, therefore, he adjudged, that the copyholds passed by the will, which was only a fair copy of a draft prepared by the attorney, and altered by him pursuant to the testator's directions, and not even seen by the testator.

An instrument in any form, whether deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, operates as a will: in *Habergham* v. *Vincent* (332),

(329) *Burkitt* v. *Burkitt*, 2 Vern. 498.

(330) 2 Sir W. Bl. 1114.

(331) 2 Bro. Ch. Rep. 59.

(332) Ante p. 302.; and see *Greene* v. *Proude*, 1 Mod. 117.

freehold and copyhold estates were devised to trustees upon trust, to convey to certain uses, remainder to such uses as the testator should by any deed or instrument in writing, executed by him and attested by two or more credible witnesses, direct or appoint; and, by an instrument on the following day under his hand and seal, attested by two witnesses, stamped, and concluding like a deed, he exercised the power in the following manner: "*Now know ye*, that by this my *deed poll*, I do direct and appoint, &c." and this instrument was proved as a will. Buller, J. (who with Mr. J. Wilson assisted the Chancellor at his request,) in considering whether the last instrument was testamentary or not, said, that it did not affect the personal estate, and therefore the ecclesiastical court acted without jurisdiction; but he considered it as a future direction, and not a deed of appointment to take effect *instanter*, in which case it would have been void: and the Chancellor decided that the second instrument was a testamentary paper, and a good disposition of the copyhold.

Indeed it should seem that a will by parol only, would be sufficient to pass copyholds. Mr. Watkin says (333), "A will by *parol* was good

(333) 1 Vol. on Cop. 130. but he makes a query? whether the 19 sec. of the 29 Car. 2. c. 3. relative to nuncupative wills, does not extend to copyholds, it being general.

"A will of copyholds not being within the statute of frauds may be revoked by parol, as a will of freeholds might have been previous to that statute. 1 Roll. Abr. 614. O. pl. 1.

" as to lands *devisable* by custom before the sta-
" tute of frauds [Co. Litt. 111. a.], and in the old
" writ of *ex gravi querela*, the custom was alleged
" generally, to devise by last will. It does not
" seem probable that a will in writing should be
" required of a burgess or villein, who were not
" permitted even to have their children taught to
" read without a licence from the lord [Paroch.
" Antiq. 401.] till they were enabled by statute
" [7 H. 4. c. 17. A. D. 1405.]."

Copyholds do not pass by a general devise of all real *estates*, unless there are other words or circumstances in the will, shewing an *evident*, or creating a *constructive*, intention on the part of the devisor, to include them in the devise (334).

This, I submit, is deducible not only from the cases cited, and others I am about to refer the reader to, but also from the settled principle, that a court will not raise the presumption of an intention to include copyholds under a general devise for payment of debts, where there are free-

Ford's case, 1 Sid. 73. *Burton & Gowell*, Cro. Eliz. 306. *Harrison's* case, [*Brook* v. *Warde*]. Dy. 310. b. *Coke & Bullock*, Cro. Jac. 49." Arg. 3 Barn. & Ald. 468 in *Vawser & Jeffery*. And see Belt's Ed. Bro. Ch. Rep. 2 Vol. 58. n. (2). By custom a will of copyholds, by parol, is good, even without any surrender, and without the aid of the stat. 55 Geo. 3. c. 192. *Devenish* v. *Baines*, 2 Eq. Ca. Abr. 43. Pre. Ch. 3.

(334) *Goodwyn* v. *Goodwyn*, 1 Ves. 226. *Harwood & Child's* case, Ca. Temp. Talb. 179. *Milbourn* v. *Milbourn*, 2 Bro. Ch. Rep. 64. S. C. 1 Cox. Ch. Ca. 247.; and see *Watkins* v. *Lea*, 6 Ves. 640.

holds, unless the copyholds have been surrendered to will, or the freeholds are insufficient.

In *Chapman* v. *Hart* (335), Lord Hardwicke, Chancellor, said, "Suppose a case (which though "I do not know to be determined, I should not "doubt to determine so,) of a person seized of "freehold and copyhold in D. who surrenders to "the use of his will, and devises all his lands and "tenements in D. to a child: there being a surrender, both freehold and copyhold would pass, if "the will was duly executed according to the statute of frauds: but if no surrender to the use of "the will, only the freehold would pass; to which "*lands* and *tenements* generally mentioned shall be "applied; there being no surrender to the use of "the will, to shew a different intent. Suppose "that will executed in the presence of two witnesses, or of one only; those general words "used; and no surrender: though this were to a "child or wife, the court would not supply the defect of surrender to the use of the will, or compel "the heir at law to surrender the copyhold to the "devisee, because the will not duly executed; "when if duly executed, the court would not have "supplied that defect: for such variation of the "construction would be very dangerous, and "might make terms, and perhaps terms attendant "on the inheritance, to pass."

(335) 1 Ves. 273; and see *Byas* v. *Byas*, 2 Ves. 164. *Lindopp* v. *Eborall*, 3 Bro. Ch. Rep. 188. *Bullock* v. *Bullock*, M. 12. Ann. Canc. 6 Vin. Abr. Cop. (M.a.) pl. 19. *Manwood's* case, Cary, 36.

And the decree at the Rolls, in *Judd* v. *Pratt* (336), that general words, as "all the residue of my real estate," will not pass unsurrendered copyholds, there being freeholds, unless an intention to include the copyholds appears by other circumstances in the will, was affirmed on appeal to the Chancellor (337), who gave his sanction to the authority of *Byas* & *Byas*, and of *Lindopp* & *Eborall*.

The same rule prevailed in *Sampson* v. *Sampson* (338), though it was contended, that, as the will had no operation on the freehold estate, there being but two witnesses, the copyhold should pass *ut res magis valeat*.

In *Ithell* v. *Beane* (339), Lord Hardwicke supplied the want of a surrender under a general devise in favour of creditors, there being no freehold lands; yet he thought it should be otherwise if there had been freehold property; this distinction, in the case of creditors, has, however, been overruled by several subsequent authorities. *Drake* v. *Robinson* (340) was a devise of all real estates to trustees for the payment of debts, the testator having both freeholds and copyholds, the latter unsurrendered; and it was adjudged, that, if there was not sufficient to pay the creditors without the copyholds, those ought to pass: The same principle prevailed in *Kidney* v. *Couss-*

(336) 13 Ves. 173.
(337) See 15 Ves. 390.
(338) 2 Ves. & Bea. 339.
(339) 1 Ves. 215. S. C. 1 Dick. 132.
(340) 1 P. W. 442.

maker (341), and in *Holmes* v. *Coghill* (342); and in the case of *Judd* & *Pratt* (343), the Lord Chancellor thus distinguished between the presumption raised in favour of creditors and a wife or children, namely, that, where the parent intending to make a provision for his child, appropriates a freehold estate, the extent of the pro-

(341) 12 Ves. 186, 158-9. It was held in this case that the court will not only supply the want of a surrender, but direct an account of rents and profits; and that laches are not to be imputed to creditors under a devise for payment of debts, as to a specific devisee, to prevent or limit such account, even against an infant heir.

(342) 12 Ves. 216.

(343) 15 Ves. 394. *Vide* also *Growcock* v. *Smith*, 2 Cox, Ch. Ca. 397. *Harris* v. *Ingledew*, 3 P. W. 96. *Haslewood* v. *Pope*, ib. 322. *Mallabar* v. *Mallabar*, Ca. Temp. Talb. 78. *Hellier* v. *Tarrant*, ib. (3d Ed.) 288. n, & the cases there cited of *Welch* v. *Cook* (1745 or 1746), and *Backbridge* v. *Slater*, at the Rolls 1766. Supp. Vin. Abr. Cop. M. a. s. 1. pl. 6. Ib. s. 3. pl. 3. *Tudor* v. *Anson*, 2 Ves. 582. *Coombes* v. *Gibson*, 1 Bro. Ch. Rep. 273. *Kentish* v. *Kentish*, 3 ib. 257. *Pennington* v. *Pennington*, 1 Ves. & Beam. 408-9.

In the above case of *Coombes* & *Gibson*, a general charge of debts was held to extend to *unsurrendered* copyhold as well as to freehold lands, but Ashurst J. said, that if the freehold had been devised to one person, and the copyhold to another, the freehold might have been first applied.

If, however, the real estates are charged generally, and the testator has surrendered the copyhold parts to the uses of his will, the amount of the debts must be raised out of the freehold and copyhold *rateably* according to their value. *Growcock* v. *Smith*, sup. See also 3 P. W. 98.

Real estates are sometimes made to bear the burthen of *mortgages* and *legacies* in exoneration of personalty, *Lawson* v. *Hudson*, Belt's Ed. Bro. Ch. Rep. 1 Vol. 57.

vision being undefined, there is no reason for increasing it by the addition of a copyhold estate; but where the testator shews an intention that his debts should be paid (344), the amount of the debts must govern the construction of intention, and therefore, if the freehold estate is not sufficient, the court draws the inference, that the testator meant to provide a sufficient fund, and will decree the copyholds to be charged in aid.

A general devise of all real and personal estate implies an intention to include copyholds, where the testator has no other real property (345): and the intention is also implied from a surrender by the copyholder to the uses of his will, even when there are freeholds (346); and also from his stating in his will, that the copyholds have been surrendered to the uses thereof, *Banks* & *Denshaw* (347).

This last case was distinguished from the case of the *Kingshead Inn, Turnham Green* (348),

(344) This intention is inferred from the prefatory words, 'I direct that all my just debts shall be first paid and satisfied.' *Godolphin* v. *Penneck*, 2 Ves. 271. *Ellison* v. *Airey*, ib. 568. *Tudor* v. *Anson*, 2 Ves. 582.

(345) *Bullock* v. *Bullock*, 6 Vin. Cop. (M. a.) pl. 19. *Smith* v. *Baker*, 1 Atk. 385. *Tudor* v. *Anson*, sup. and see *Nicholls* v. *Butcher*, 18 Ves. 193. *Pennington* v. *Pennington*, 1 Ves. & Beam. 406.

(346) *Tendril* v. *Smith*, 2 Atk. 85. *Goodwyn* v. *Goodwyn*, 1 Ves. 227. *Andrews* & *Waller*, *Bullock* & *Bullock*, *Byas* & *Byas*, *Hawkins* & *Leigh*, ubi sup. and see *Manwood's* case, Cary, 36.

(347) 1 Ves. 63.

(348) 1 Ves. 63, 121. and see *Gascoigne and others*, v. *Barker*, 3 Atk. 8.

where, under a devise by a copyholder of all his copyhold estate *which* he had surrendered to the use of his will, a surrender, as to one third part lying in a different manor from the other two thirds, was not supplied, the relative pronoun "*which*" inducing the decision in the latter case.

But the frequent addition in a will of the words "*the copyhold part thereof having been previously surrendered to the use of my will*," has been considered in a devise of freeholds and copyholds, as a mistaken description, where no such surrender had, in point of fact, been made(349): and in *Wilson* v. *Mount* (350), the testator having, in a devise of freehold and copyhold estates, used the words, "(*the copyhold part whereof I have surrendered to the use of my will*,") the Master of the Rolls thought he meant only to devise such copyholds as were surrendered, and that the clause in the parenthesis was to be rejected, as being a mere mistake.

And though in *Church* v. *Mundy* (351), under a general devise of all the testator's worldly estate and effects, whether real or personal, a bill to supply the want of a surrender of a reversionary copyhold interest in favour of a wife, was dismissed with costs by the Master of the Rolls, who expressed an opinion, that the general words of the devise could not be held to pass the rever-

(349) *Rumbold* v. *Rumbold*, 3 Ves. 65.

(350) 3 Ves. 191. Vide also *Gascoigne* & *Barker*, 3 Atk. 8.

(351) 12 Ves. 426.

sionary interest, whether there was or was not any freehold estate to which they could apply; yet, on an appeal from that decree, the Lord Chancellor held, that if the testator *had no freehold* property, the words, "real estate" were capable of application to the reversion of the copyhold, and observing that *Chapman* & *Hart*, decided by Lord Hardwicke, was an authority of great weight, he directed a reference to the master to ascertain, whether the testator had any and what freehold estates at the time of making his will (352).

But a general devise of all freehold and *copyhold* lands, creates a presumption of an intention to pass copyholds not surrendered to the uses of the will, although the testator is possessed of other copyholds which have been so surrendered (353).

In construing wills of copyhold lands, the courts are not governed by any express legal terms, any more than in a devise of freeholds; and copyholds will therefore pass by the words "all the residue of my property and effects (354);"

(352) 15 Ves. 396. And see *Jones* v. *Tucker*, 2 Meriv. 537.

(353) *Blunt* v. *Clitherow*, 10 Ves. 589. *Andrews* v. *Waller*, ubi sup.

(354) *Doe* d. *Andrew and others* v. *Lainchbury and others*, 11 East, 290. *Doe* d. *Wall* v. *Langlands*, 14 East, 370. *Doe* d. *Bunny* v. *Rout*, 7 Taunt. 79. It has been decided that copyholds will pass by the words 'all that my copyhold ground rent,' *Walker* v. *Shore*, 19 Ves. 391.

As to the construction of the words 'ground rent' in printed particulars of sale, see *Stewart* v. *Alliston*, 1 Meriv. 26.

or under the description of "personal estate (355)," where there is a manifest intention on the face of the will to devise real estates; and the words "real property," or the word 'estate' or 'estates' will pass all the interest of the testator, as well as the land (356).

(355) *Doe* d. *Tofield* v. *Tofield*, 11 East, 246. *Vide* also *Hope* v. *Taylor*, 1 Burr. 268. *Cuthbert* v. *Lemprjere*, 3 Mau. & Sel. 158.

(356) *Nicholls* v. *Butcher*, 18 Ves. 193. *Jongsma* v. *Jongsma*, 1 Cox Ch. Ca. 362. *Carter* v. *Horner*, 4 Mod. 89. S.C. 1 Show. 348. *Scott* v. *Alberry*, 1 Comy. 337. *Wilson* v. *Robinson*, 2 Lev. 91. S.C. 1 Mod. 100. S.C. 3 Keb. 180, 245. *Macaree* v. *Tall*, Amb. 181. *Tuffnell* v. *Page*, 2 Atk. 38. S.C. Barn. 14. *Doe* d. *Burkitt* & *others* v. *Chapman*, 1 H. Bl. 223. *Doe* d. *Child and Wife* v. *Wright and others*, 8 T.R. 64. *Doe* d. *Wright* v. *Child and Wife*, 1 N.R. 336. *Reid* v. *Shergold*, 10 Ves. 378. *Randall* v. *Tuchin*, 6 Taunt, 410. But see *Goodwyn* v. *Goodwyn*, 1 Ves. 227. *Pettiward* v. *Prescott*, 7 Ves. 541. The reader is also referred on this subject to the following authorities: *Reeves* v. *Winnington*, 3 Mod. 45. *Cole* v. *Rawlinson*, 1 Salk. 234. *Countess of Bridgwater* v. *Duke of Bolton*, ib. 237. S.C. 6 Mod. 106. *Hopewell* v. *Ackland*, 1 Salk. 239. S.C. Comy. 164. *Beachcroft* v. *Beachcroft*, 2 Vern. 690. *Shaw* v. *Bull*, 12 Mod. 594. *Cliffe et al.* v. *Gibbons et al.* 2 Ld. Raym. 1324. *Barry* v. *Edgworth*, 2 P.W. 524. *Burdet* v. *Burdet*, 1 Inst. 345. *Ibbetson* v. *Beckwith*, Ca. Temp. Talbot, 157. *Tanner* v. *Wise*, ib. 284. S.C. 3 P.W. 295. *Timewell* v. *Perkins*, 2 Atk. 102. *Ridout* v. *Pain*, 1 Ves. 10. S.C. 3 Atk. 486. *Bailis* v. *Gale*, 2 Ves. 48. *Doe* & *Underdown*, Willes, 296. *Stiles* d. *Rayment and Wise* v. *Walford*, 2 Sir W. Bl. 938. *Hogan* d. *Wallis and others* v. *Jackson*, Cowp. 299. *Loveacres* d. *Mudge* v. *Blight & Ux.* ib. 352. *Denn* d. *Gaskin* v. *Gaskin*, ib. 657. *Right* d. *Mitchell et ux.* v. *Sidebotham and another*, 2 Dougl. 763. *Huxtep* v. *Brooman*, 1 Bro.

A charge upon the estate of an annual payment, which might continue beyond the life of the devisee, will induce the construction of a fee in a limitation, which would otherwise only create a life interest (357): So also

Ch. Rep. 437. *Holdfast* d. *Cowper* v. *Marten and others*, 1 T. R. 411. *Fletcher* v. *Smiton*, 2 T. R. 656. *Doe* d. *Palmer and others* v. *Richards*, 3 T. R. 356. *Doe* d. *Beezley* v. *Woodhouse and others*, 4 T. R. 89. *Goodright* d. *Baker* v. *Stocker*, 5 T. R. 13. *Andrew* v. *Southouse*, ib. 292. 1 Bos. & Pul. 247-8. *Trent and others* v. *Hanning and others*, 1 N. R. 116. S. C. 7 East, 97. *Roe* d. *Child et Ux.* v. *Wright*, 7 East, 259. *Roe* d. *Shell* v. *Pattison*, 16 East, 221. *Sir Arthur Chichester* v. *Oxendon*, 4 Taunt. 176. *Chorlton* v. *Taylor*, 3 Ves. & Bea. 160. *Hick* v. *Dring*, 2 Mau. & Sel. 448. *Uthwatt* v. *Bryant*, 6 Taunt. 317. *Denn* & *Hood*, 7 Taunt. 35. *Roe* & *Bacon*, 4 Mau. & Sel. 366. *Harding* v. *Gardner*, 1 Taunt & Brod. 72. But see *Frogmorton* d. *Wright* v. *Wright and another*, 3 Wils. 414. S. C. 2 Sir W. Bl. 889.

It is an established principle, that where an estate is limited by will to the child of a prior devisee for life, without words of inheritance, with remainder over in fee should such child die before a certain age, the child takes an absolute fee on attaining the particular age. *Purefoy* & *Rogers*, 2 Saund. 388. *Marshall* & *Hill*, 2 Mau. & Sel. 608. *Doe* d. *Elsmore and others* v. *Coleman and others*, 6 Price, 179.

As to the effect of the word "hereditament" in a devise of copyholds, *vide Denn* d. *Mellor* v. *Moor*, in error, 1 Bos. & Pul. 558, 30. 5 T. R. 558. 6 T. R. 175. *Doe* d. *Small and others* v. *Allen*, 8 T. R. 503: see also *Hopewell* & *Ackland*, 1 Salk. 239. *Canning* & *Canning*, Mos. 240.

(357) *Collier's* case, 6 Co. 16. a. *Ansley* & *Chapman*, Cro. Car. 157. *Baddeley* v. *Leppingwell*, 3 Burr. 1533, and see *Frogmorton* d. *Bramstone* v. *Holyday et al.* ib. 1618. *Loveacres* & *Blight*, Cowp. 352. *Goodright* d. *Baker* v. *Stocker*, 5 T. R. 13. *Andrew* v. *Southouse*, ib. 292. *Doe* & *Clayton*, 8 East, 141.

a charge of a sum in gross, or of all debts and legacies (358).

The effect of the word "estate" or "property" in a devise, may, however, be restrained by the intention collected from the general words of the will (359), and by a term of locality, if the whole is merely descriptive of the local situation (360): but it was held by Lord Hardwicke, in *Bailis* v. *Gale* (361), that the words, "*all that estate I bought of Mead*," passed both the interest and land, and were not descriptive only. And in *Roe* d. *Child* & *Wife* v. *Wright* (362), the words, "*all my estate, lands, &c. known and called by the name of the Coal Yard, in the parish of St. Giles,*

[358] See the several authorities, ante, (n. 357): vide also *Doe* & *Richards*, 3 T.R. 356. *Denn* & *Mellor*, 5 T.R. 558. *Doe* & *Holmes*, 8 T.R. 1. *Goodtitle* & *Maddern*, 4 East, 496. *Doe* & *Snelling*, 5 East, 92. But this is only where the devisee is charged. Vide the authorities antea in this note and in n. (357); see also *Dickins* v. *Marshal*, Cro. Eliz. 330. *Fairfax* v. *Heron*, 2 Eq. Ca. Abr. 307. *Canning* v. *Canning*, Mos. 240. 2 Atk. 341. *Roe* & *Blackett*, Cowp. 239. *Doe* & *Clarke*, 2 N.R. 349.

(359) *Wilkinson* v. *Merryland*, Cro. Car. 447-9. *Marhant* v. *Twisden*, Gilb. Eq. Rep. 30. *Chester* v. *Painter*, 2 P.W. 335. *Bailis* v. *Gale*, 2 Ves. 51. *Doe* d. *Spearing* v. *Buckner*, 6 T.R. 610. *Hilton* v. *Kenworthy*, 3 East, 553. *Roe* d. *Helling* v. *Yeud*, 2 N.R. 214. *Woollam* v. *Kenworthy*, 9 Ves. 137. *Doe* d. *Bunny* v. *Rout*, 7 Taunt. 79.

(360) *Doe* & *Clayton*, 8 East, 141.

(361) 2 Ves. 48.

(362) 7 East, 259. and see *Tuffnell* v. *Page*, *Barry* v. *Edgworth*, *Goodwyn* v. *Goodwyn*, *Chichester* v. *Oxendon*, *Chorlton* v. *Taylor*, *Uthwatt* v. *Bryant*, *Randall* v. *Tuchin*, *Denn* v. *Hood*, *Harding* v. *Gardner*, ante, (n. 356.)

London," were held not to be a local description only, but to pass the fee (363).

And again in *Roe* v. *Bacon* (364), where the testator devised all his freehold lands, messuages, and tenements, at &c. to his wife for her life, and after her decease, *all the said estates* to be divided among his four sons and his son-in-law C. T., share and share alike, the court of B. R. held, that the sons took a *fee*, in remainder, after the death of the wife.

The rules adopted in freehold cases, as to words of recommendation in a will, and exclusive dispositions under powers, apply equally to copyholds. So in *Macey* & *others* v. *Shurmer* (365), which was a devise by N. S. to his wife, her heirs and assigns for ever, being well assured that she would, at her decease, dispose of the lands amongst all or such of his children, as she, in her discretion, should think most proper, and as they by their conduct should deserve; it was held, that the word "*such*" gave the wife the power to make an exclusive disposition to any one child.

And though a man may execute a power over copyholds without reciting it (366), yet it is necessary he should mention the estate he means

(363) The words 'my estate *of* A,' and 'my estate *at* A,' are words of the same import. See *Oxendon* & *Chichester*, 4 Dow's P. C. 92; which case has decided that, except where there is a latent ambiguity, parol or extrinsic evidence is not admissible to explain a will.

(364) 4 Man. & Sel. 366.

(365) 1 Atk. 389.

(366) *Manwood's* case, Cary's Rep. 36.

to dispose of (367); and, therefore, where a testator, having a power to appoint a copyhold estate, by deed or will (368), made a general devise of all the residue of his effects, real and personal, Lord Hardwicke adjudged, that the copyhold did not pass, noticing that the testator had other lands, on which the devise might be satisfied (369).

The courts incline to construe a devise of copyhold, as of freehold, so as to annex the legal estate to the equitable; therefore, under a devise to A. and B. and their heirs, in trust to permit C. or her assigns to occupy the same, or to pay to, or permit her or her assigns to receive the rents, for her natural life, for her separate use, and subject to such estate and interest of C. to such uses as C. should by her will appoint, and in de-

(367) But this is only when the testator has other estates to which the devise would apply, ante, p. 305 et seq.

Equity will direct an enquiry, whether there be any thing but copyhold to answer the devise. Secus in the case of a power to appoint personalty, *Jones* v. *Tucker*, 2 Meriv. 537.

(368) It has been decided by the House of Lords, that a power of revocation reserved to A. *by any writing* under his hand and seal attested by two or more credible witnesses, and of appointing new uses *by the same or any other deed*, may be exercised by *the will* of A, without noticing the power. *Countess of Roscommon & Fowke*, 6 Bro. P.C. 158. See also other cases on this subject cited by Mr. Sugden in his treatise on Powers, 186-7. *Doe* & *Holloway*, 1 Stark. 431. ante, p. 304.

(369) *Ex parte Caswall*, 1 Atk. 559. We have seen that a power when coupled with an interest cannot be executed by an infant, ante, p. 148-9.

fault of appointment, to her right heirs; it was held, that the estate was vested in A. and B. and their heirs, for the life of C. and that the legal estate, after C.'s death, vested in the appointee under her will, who recovered in ejectment against the assignee of the person to whom the trustees had surrendered (370).

When a copyholder has made a surrender to the uses of his will, and by his will devises that his copyholds shall be sold, a Court of Equity will give effect to the power of sale (371). The case of *Blatch* & *Wilder* (372) may be thought to imply, that the heir at law would be a necessary party to such a sale, but the contrary appears to have been decided (373).

(370) *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382. Vide also *Lord Say and Seal* & *Lady Jones*, 3 Bro. P. C. 113. *Doe* & *Simpson*, 5 East, 162. *Hawker* v. *Hawker*, 3 Barn. & Ald. 537.

(371) *Blatch* & *Agnis* v. *Wilder and others*, 1 Atk. 420. *Bateman* v. *Bateman and others*, ib. 421. And see *Bright* v. *Hubbard*, Cro. Eliz. 68. *Brent* or *Beal* v. *Sheppard*, Cro. Jac. 199.

(372) Sup.

(373) In the above case of *Brent* or *Beal* v. *Sheppard*, a copyholder in fee surrendered to the use of his will, and devised his copyhold land to his wife, and if she had any issue by him, then to such issue at the age of twenty-one, and if the issue died before that age, or before his wife, or if she had no issue, *then she to choose two attornies, and to make a bill of sale of the lands to the best advantage*; and the court held that she had the lands for life, and not having issue, had not any interest to dispose of, but had authority by will to nominate two, who should sell, and that the vendee should be in by the first will, and that no new surrender would be necessary.

For several authorities on

But few cases, if any, can arise under a will, where the intention will not prevail, if discoverable by the court (whether of law or equity); though it must frequently happen that the designs of a testator are defeated by the obscurity, not only of the language of the particular devise, but of the context of the will (374): devises of copyholds are more particularly favoured in this respect, as the courts raise the presumption of, and give effect to the copyholder's intention to pass lands acquired after the date of the will, if there are words in it sufficiently comprehensive to include them, and the lands have been surrendered to the uses of the will (375): this point was first discussed in *Heylyn* v. *Heylyn* (376), and though the authority of that case has been doubted (377), the case of *The Attorney General* v. *Vigor* (378) *and several others* (379) have put the question at rest.

In *Hawkins* v. *Leigh and others* (380) a general devise of all the testators *unsettled* lands, (there being both freehold and customary lands, part

powers of sale expressly given to executors, or arising by implication from the tenor of the will, see 8 Vin. (Devise) M. e. to S. e. Vide also post, tit. "*Admittance*," "*Fine*," (POWER).

(374) See *Woodhouse* v. *Meredith*, 1 Meriv. 450.

A copyhold brewhouse and malthouse, *let on lease with plant and utensils*, were devised by the decription of copyhold messuages; the plant held to pass. *Wood* & *Gaynon*, Amb. 395.

(375) Ante, p. 271-2.

(376) Cowp. 130. Lofft, 604.

(377) See 1 Watk. on Cop. 127.

(378) 8 Ves. 286.

(379) *Ante*, (n. 259.)

(380) 1 Atk. 388.

of the former settled, and the latter not having been surrendered to will,) was held to pass the *unsettled* freehold lands only, notwithstanding there were the prefatory words "as for my worldly estate, &c." the court conceiving that by the word "*unsettled*," the testator must have meant lands of the same kind as those settled.

But prefatory words, similar to the above, are generally held to influence all the subsequent clauses of the will (381).

Taylor v. *Taylor* (382) was another case of construction in which the intention prevailed,—there A. gave his copyhold to the child or children with which his wife was enseint, and to the heirs of such child or children for ever; and if such child or children should not be born alive, or, being born alive, should die without leaving lawful issue, or before he or she had disposed of the same, then he gave it to his wife: the wife was not with child, and Lord Hardwicke was of opi-

(381) *Tudor* & *Anson*, 2 Ves. 582. *Coombes* & *Gibson*, 1 Bro. Ch. Rep. 274. *Godolphin* v. *Penneck*, 2 Ves. 271. *Ellison* v. *Airey*, Ib. 568. Belt's Supp. 341, 417.

(382) 1 Atk. 386. See also *Edwards* v. *Symons*, 6 Taunt. 213, where under a devise of freehold and copyhold lands, in trust to receive and apply the *rents* for the maintenance, education, and advancement of the testator's five sons, and daughter Elizabeth, and immediately on Elizabeth attaining twenty-one, then the testator devised the said lands to his said six children, and to the *survivors and survivor* of them, their heirs and assigns for ever, as tenants in common, it was held, that such of the children as survived the testator, took on his decease a vested fee, as tenants in common.

nion, that it was well devised, so as to have a surrender supplied, and that it ought to be construed as if the testator had said, "*and if no child be born alive.*"

It was decided in a very recent case (383), that a devise to A. for life, and after his death to the second, third, and all other the sons of A. (the eldest son excepted), successively in tail, gives a vested interest to the second son of A. as soon as he has two sons in esse, not capable of being divested by the death of the eldest son.

Under a devise of copyholds to R. for life, and after his decease to the heir of his body, in the singular number; the court held that R. took an estate in fee simple (384).

It has been adjudged, that a devise on condition to pay a certain sum, is a limitation, and not a condition, if the devise be to the customary heir, but a condition according to the words if it be to any other person; and that the condition is not broken unless the sum is demanded (385).

And in *Clerke* v. *How* (386), it was ruled by C. J. Holt, that if copyhold land be surrendered to the use of a will, and afterwards is devised to

(383) *Driver* d. *Frank* v. *Frank*, 3 Mau. & Sel. 25. 6 Price, 41.

(384) *Pawsey* v. *Lowdall*, Sty. 249. 273. 1 Fearne, 279. But if there are superadded words of limitation, the word 'heir' is a word of purchase, *Archer's* case, 1 Co. 66. b.

(385) *Curteis* v. *Wolverston*, Cro. Jac. 56, and see *Wellock* & *Hamond*, ante, p. 200. *Marston* v. *Marston*, Nel. Ch. Rep. 24.

(386) 1 Ld. Raym. 726.

B. and his heirs, upon condition that he pay 100*l.* within six months after the death of the devisor to J. S.; if the money is not paid, J. S. ought to be admitted, and then he must make an actual entry before he can surrender: therefore, a surrender made in that case by J. S. before actual entry, was adjudged ill.

In fixing the intention under an ambiguous devise, the Court of Chancery inclines to a construction in favour of creditors; so in *Noel* v. *Weston* (387), the will contained an introductory clause, that "the testator's just debts, &c. should be paid and satisfied," and then bequeathed the personal estate to S. W. subject to the payment of the debts, &c.; but in case the personal estate was insufficient, the testator charged his *freehold* estates with the payment thereof, and *subject thereto*, he devised all his freehold and *copyhold* estates (which he had surrendered or intended to surrender to the use of his will,) to the said S. W. for life, with remainder over; the Vice Chancellor, relying on the effect of the words '*subject thereto*,' held, that the copyhold estates were applicable to the debts as well as the freehold.

In another case (388), the testator expressed his intention to dispose of the whole of his estate

(387) 2 Ves. & Beam. 269, and see *Coombes* & *Gibson*, 1 Bro. Ch. Rep. 274. *Tudor* v. *Anson*, 2 Ves. 582.

(388) *Godolphin* v. *Penneck*, 2 Ves. 271. And see *Ellison* v. *Airey*, Ib. 568.

and effects, and directed that *all his debts and funeral expences should be first paid*, and then, subject thereto, he devised particular parts of his estate, to different persons; and the question was, whether certain customary lands mentioned in the will, and which had been surrendered by the testator to the uses of his will, were subject to the debts; and Lord Hardwicke held that they were, the prefatory words '*all his debts, &c.*' running over all the subsequent clauses of the will (389).

An heir at law, having more than an equity, is incapable of devising before admittance, or, at least, without surrendering to the uses of his will (390); this was clearly a settled rule prior to the act of 55 Geo. 3. c. 192, but it has been doubted, whether an unadmitted customary heir, is not a copyhold tenant within the meaning of that act, and the better opinion would seem to be that he is, and consequently that he may devise before admittance.

A feme covert we have seen cannot devise copyhold lands pursuant to a surrender, made when sole, to the use of her will (391); yet if the husband, previous to the marriage, agrees that she may settle or devise the same during coverture, the devisee of the wife would have a good

(389) *Ante*, p. 319.

(390) *Smith* v. *Triggs*, 1 Stra. 487. *Hawkins* v. *Leigh*, 1 Atk. 388. 1 Watk. on Cop. 102. see the Act 55 Geo. 3. c. 192, in the Appendix.

(391) *Ante*, p. 144, 272.

title in equity (392); but if the will, in such a case, were executed previous to the marriage, it would be revoked by the marriage (393).

The interest of a *cestui que trust* in copyhold property, is devisable without surrender to will, an equitable estate, as is already shewn, not being the subject of surrender (394); and a will attested by two witnesses only, or even an unattested will, is sufficient to pass a trust of copyholds (395), as well as the land itself; but the intention to devise such equitable interest must be evident (396), and a general devise by the words "all other my real estate," will include the trust of copyholds (397), even if the testator has the legal interest in other copyholds, some surrendered and others not surrendered to the uses of

(392) *Rippon* v. *Dawding*, [or *Harding*], Amb. 565. *George* d. *Thornbury* v. *Rippon* & *Dawding*, Ib. 627. 473 marg. vide also *Baker* v. *Child*, 2 Vern. 61. 1 Eq. Ca. Abr. 62.

(393) *Hodsden* v. *Lloyd*, 2 Bro. Ch. Rep. 534. 4 Co. 61. 2 P. W. 624.

(394) *Ante*, p. 266, 274. 1 Bro. Ch. Rep. 482. 1 H. Bl. 461.

(395) *Appleyard* v. *Wood*, Select Cases temp. King, 42 *Tuffnell* v. *Page*, 2 Atk. 37. S. C. Barn. 9. but it was formerly thought otherwise, *Wagstaff* v. *Wagstaff*, 2 P. W. 259. And it should seem that the devise of an equitable interest in customary lands, as distinguishable from copyholds, must be attested according to the statute of frauds, *Hussey* v. *Grills*, Amb. 299; except such customary lands pass by surrender and admittance, *Doe* & *Danvers*, 7 East, 299.

(396) *Allen* v. *Poulton*, 1 Ves. 121. *Gibson* v. *Lord Montfort*, Ib. 489.

(397) *Car* v. *Ellison*, 3 Atk. 73. 9 Mod. 75, in *Acherley* v. *Vernon*.

his will (398). It follows, that an equity of redemption, where the mortgagee is admitted, which is an equitable interest, is devisable without surrender to will (399): and that a purchaser, whether he has taken a surrender or not, may devise before admittance, having a title in equity (400).

But it was decided by the late Vice Chancellor, that a devisee who has not been admitted, has not such an equitable interest as is devisable, establishing, therefore, that it is not every one who has an incomplete legal title, that has an equitable title; or, in other words, that it is not every surrenderee, that has a devisable interest (401).

When a copyholder surrenders to particular uses, limiting the reversion in fee to himself, he is in of his former estate; and if he afterwards surrenders to will and devises the estate, and is subsequently admitted according to the surrender to uses, such admittance will not be a revocation of his will (402); and by the same rule, if a copyholder in fee surrenders to will, and afterwards makes a surrender to particular uses on his marriage, with the reversion to himself in fee, and then devises the estate, the devise will be sup-

(398) *Allen* v. *Poulton*, 1 Ves. 121.

(399) *Ante*, p. 274. (n. 269.)

(400) See the cases ante, p. 274. (n. 268).

(401) *Wainewright* v. *Elwell*, 1 Mad. Rep. 627.

(402) *Roe* d. *Noden* v. *Griffits and others*, 4 Burr. 1952.

ported by the surrender to the use of the will (403.)

If, however, a copyholder, after devising his estate, conveys it *entirely* away, though he takes it back again the same day, it is a revocation of the devise (404); and in *Vawser* v. *Jefferey* (405), it was held, by the late Master of the Rolls, that a devise of copyholds was revoked in equity, by a covenant to surrender the estates to the same uses as were created by the marriage settlement of the devisor, of certain freehold lands, the object of the settlement being to secure a jointure annuity to the wife:—the decree appears to have been made on the ground, that an agreement to convey revokes a devise as well as an actual conveyance (406); and from an impression, that if a surrender had been made to the uses of the settlement, the will would have been revoked at law. But the Judges of the Court of B. R. have certified a direct contrary opinion on the latter point, in a recent case sent to them by the Lord Chancellor (407), which case contained a statement of facts similar to those in the report of *Vawser* & *Jefferey* in 16 Ves., except only that in the case sent to the Court of King's Bench, the copyhold

(403) *Thrustout* d. *Gower* v. *Cunningham*, 2 Sir W. Bl. 1046.

(404) *Roe* d. *Noden* v. *Griffits and others*, ante. 1 Wils. 308.

(405) 16 Ves. 526.

(406) See *Rider* v. *Wager et al.* 2 P.W. 332. *Cotter* v. *Layer*, *ib.* 624. *Knollys* v. *Alcock*, 5 Ves. 653.

(407) *Vawser* & *Jefferey*, 3 Barn. & Ald. 462-6.

estate is mentioned *to have been surrendered to the uses of the settlement.*

In the case of *Reid* v. *Shergold* (408), H. M. S. cestui que trust for life of copyholds, with a power to dispose thereof by will, after acquiring the legal customary estate of inheritance, and surrendering to the uses of her will, devised the copyholds pursuant to the power, and then sold and surrendered to a purchaser; and the Chancellor (Lord Eldon) held, that the surrender could not be considered in equity an attempt towards the execution of the power, and adjudged that such surrender was nevertheless a revocation of the will.

(408) 10 Ves. 370. The devise in this case was to S. B. & W. H. and to the survivor of them, and to the executors or administrators of such survivor, in trust for the sole and separate use of H. M. S. (the wife of H. S.) for life, and when M. G. S., daughter of H. M. S., should attain twenty-one, or after the death of her mother, to transfer the copyhold premises to her the said M. G. S.; but if she died before twenty-one, the testator devised the same to such persons as H. M. S. should by will give and dispose thereof. The testator gave full power to the trustees with the consent of H. M. S. to sell and surrender the copyholds, and gave the residue of his estate real and personal to W. G. M. G. S. survived the testator and died under twenty-one in the life-time of her mother. W. H. was admitted tenant, and S. B. attended the court and declined to act. W. H. afterwards by the direction of H. M. S. surrendered to her in fee, and she was admitted, and then surrendered to will; and it was observed by Lord Eldon, that the effect of such refusal of S. B. to act in the trust, and the admission of W. H., was, that he was owner of the entire legal interest, in trust for the niece for life, for

The rule in freehold cases, that where a man has an equitable interest in fee, and devises the land, and afterwards the legal fee descends to him, or he takes a conveyance of the legal estate to himself in fee, or to a trustee, such descent or conveyance is no revocation of the devise, is (as it would seem) equally applicable to copyhold estates (409).

her daughter surviving her if she attained twenty-one, and if she died under twenty-one, for the residuary devisee; and that by the surrender to H. M. S., she became intitled to the legal estate, upon the same trusts.

(409) *Greenhill* v. *Greenhill*, 2 Vern. 670. *Marwood* v. *Turner*, 3 P. W. 163. *Swift* d. *Neale* v. *Roberts*, 3 Burr. 1490. *Parsons* v. *Freeman*, 3 Atk. 741-9. S.C. 1 Wils. 308. *Sparrow* v. *Hardcastle*, *ib.* 803-4. *Doe* d. *Gibbons* v. *Pott and others*, 2 Dougl. 717. *Watts and others* v. *Fullarton*, cited *ib.* 718. 1 Watk. on Cop. 124-5.

As to implied revocations of a will, see *Kenebel* v. *Scrafton*, 2 East, 530. *Reid* v. *Shergold*, 10 Ves. 370. It has been decided, that although marriage and the birth of a child are such an entire change in the circumstances of a person, as to be an implied revocation of a will (see *Doe* & *Lancashire*, 5 Tr. 49. *Shepherd* v. *Shepherd*, *ib.* 51. n. *Eyre* v. *Eyre*, cited in *Cook* v. *Oakley*, 1 P.W. 304. *Wellington* v. *Wellington*, 4 Burr. 2167, 2171. *Christopher* v. *Christopher*, ib. 2182. *Gibbons* v. *Caunt*, 4 Ves. 848, and several other cases cited in *Brady* v. *Cubitt*, 1 Dougl. 35); Yet, that either of those events singly, is not sufficient to work a revocation. *Doe* d. *White* v. *Barford and another*, 4 Mau. & Sel. 10. *Wilkinson* v. *Adam*, 1 Ves. & Beam. 465. And see *Jackson* v. *Hurlock*, Amb. 487. *Parsons* v. *Lanoe*, ib. 561. *Thompson* & *Wife* v. *Sheppard*, cited ib. 490, 561. *Gray* v. *Altham*, cited ib. 490. *Brady* v. *Cubitt*, 1 Doug. 31. (sup.) which latter case decided, that an implied revocation by marriage and the birth of a child, may be rebutted by parol evi-

And as the assignees of a bankrupt are trustees for him after payment of the debts, a devise of real estate is not revoked by bankruptcy (410).

The will of a copyholder is ambulatory until his death, equally with a will executing a power of appointment in freehold cases, therefore a devisee of copyholds dying in the life-time of the testator, will take no benefit under it (411); nor in such a case will the heir be entitled, under a devise to A. for life, and after his decease, to the heirs of his body (412).

We have already seen, that so much of the copyholder's interest, as is not devised away from the customary heir, the heir will take by descent (413); and this rule extends equally to a devise *to* the heir in fee, with an executory devise over on some future event, (as, for instance, in case of the death of the heir under twenty-one, without leaving issue,) and to a devise *from* the heir in a like event, when there is no devise to him until the contingency happens (414); though

dence. Vide also ex parte the *Earl of Ilchester*, 7 Ves. 348. *Sheath* v. *York*, 1 Ves. & Beam. 390. *Wilkinson* v. *Adam*, sup. but see 4 Ves. 848. in *Gibbons* v. *Caunt*, where *Lord Alvanley* expressed his disapprobation of the practice of receiving evidence against the presumption raised by marriage and the birth of a child.

(410) *Charman* v. *Charman*, 14 Ves. 580.

(411) *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. 65, 77. Belt's Supp. to Ves. Sen. 279.

(412) *Busby* & *Greenslate*, 1 Stra. 445. 1 Fearne, 80. *Shelley's* case, 1 Co. 104.

(413) *Ante*, p.p. 55, 155.

(414) *Doe* d. *Pratt and*

it was formerly thought, on the authority of *Scott* & *Scott* (415), that the heir would take by purchase, and not by descent, under a devise to him in fee, with an executory devise over (416): And

others v. *Timins and another*, 1 Barn. and Ald. 530. And see *Haynsworth* [or *Hamsworth*] v. *Pretty*, Cro. Eliz. 833. 919. S.C. Mo. 644.

(415) Amb. 383; where the case is thus reported. "Scott "devised to Henry, his eldest "son, and only son by a former wife, and to his heirs "and assigns, all other his real "estate not before devised: "nevertheless, in case he should "die without issue, not having attained 21, then, from "and immediately after his "death under age and without issue, unto the testator's "son William, and the heirs "male of his body, with remainders over. The eldest "son attained 21. The specialty creditors (not having a lien on the real estate) "having exhausted the personal estate in satisfaction of "their demands, the legatees "contended to stand in their "place, and come upon the "real estate. Q. Whether the "eldest son took by devise or "descent? In the latter case, "the legatees would be intitled; in the former, not. "HENLEY *Lord Keeper*, after "having taken time to this "day, gave his opinion, that "the eldest son took by devise, "as having under the will a "different estate than would "have descended to him, the "one being pure and absolute, "the other not."

(416) A note of the late Mr. Serjeant Hill's in the author's possession, which was read in the above case of *Doe* & *Timins*, is well calculated to shew the grounds of the erroneous inference that has been drawn from the determination in *Scott* & *Scott*. The note is written in the margin of Ambler's Reports, and is in hæc verba: "The determination in this "case is right, but the reason "given for it is wrong; that "the reason is wrong appears "from Cro. Eliz. above referred to," [Cro. Eliz. 833, 919.] "and many other cases; "but though a devise of a fee-

it is to be recollected, that even a devise to the heir, charged with debts or incumbrances, does

" simple to the testator's heir " is void in all cases, notwith- " standing the land is devised, " subject to a charge, as ap- " pears by the cases referred to " by Ambler in the margin, " by Str. 1270, Lord Raym. " 728, 2 Burr. 879, 882, 1 Vent. " 372, S.P. admitted Hob. 30, " and many other authorities, " all contrary to *Gilpin's* case, " Cro. Car. 161, which has " sometimes been cited, and " expressly overruled, as in " Comy. 72; and so a devise " to the testator's heir in fee, " subject to a contingency, as " in Cro. El. ub. supr. and in " the case here before Lord " Northington, is void, for it " amounts to the same, as if " there had been no devise to " him, but only a devise from " him upon a contingency; " and, therefore, if the contin- " gency on which the devise " from him is to take effect, " never happens, the heir takes " by descent, and not by pur- " chase. Yet [Though] a de- " vise to the testator's heirs, if " not restrained to a less estate " than a fee-simple, is void as " to passing the estate, yet the " devise to the heir will in " many instances influence the " construction of the will, as was " holden by Lord Holt, 1 Wms. " 24, 25, and accordingly ad- " judged in the case there; and " so was the opinion of Lord " Harcourt with respect to the " point on which the decision " here reported by Ambler, " must have been founded; " for, according to the case in " Salk., though if lands de- " scend to an heir (which from " the context must be under- " stood where they are not " mentioned in the will to be " devised to him,) if the per- " sonal estate be exhausted in " payment of bonds, the le- " gatees may stand in their " place, and be paid out of the " real estate, as is clear they " may, and he seemed to ad- " mit the same, yet Lord Cow- " per in that case held, that " since the testator had devised " the lands that they ' ought " to be exempted, for it was as " much the testator's intention " that the devisee should have " this land, as the others should " have the legacies, and a spe- " cific legacy is never broke

not affect the deseent to the heir, either as to freehold or copyhold lands (417).

On the Practice in Equity of putting a Party to Election.

IT may be well, in conclusion of the present chapter, to shew that the doctrine of election extends to copyholds, and I shall, on this subject, first refer the reader to the case of *Frank* v. *Standish* (418), in which the testatrix, having surrendered to the use of her will, afterwards exchanged part of her copyholds for others which were not so surrendered, and then devised all her freehold and copyhold estates:—two of her co-heiresses took beneficially under the devise, and one of them, and also the third co-heiress,

" into in order to make good " a pecuniary one.' "

In the above case of *Doe* & *Timins*, *Bayley* J., observed, " I can see no reason therefore, " why the heir at law here, " should not take by descent, " and there are strong reasons " why he should. *The case of* " *Scott* v. *Scott has received a* " *sufficient answer in argument* " *at the bar.*"

(417) *Ante*, p. 56. *Haynsworth* v. *Pretty*, ubi sup. *Chaplin* v. *Leroux*, 5 Mau. & Sel. 14.

(418) Cited in *Highway and others* v. *Banner and others*, 1 Bro. Ch. Rep. 588, and in *Judd* v. *Pratt*, 15 Ves. 391. And see *Macnamara* v. *Jones*, Belt's Ed. Bro. Ch. Rep. 1 Vol. 481. The reader is also referred to an interesting note on the nature and origin of the doctrine of election in 1 *Swanston's* Ch. Rep. 394. and see ib. 420 et seq. in *Gretton* v. *Haward*.

were pecuniary legatees; and the Court of Exchequer decreed, that the defendant, one of the co-heiresses, having made her election to take under the will by accepting her legacy, she and the other co-heiresses should surrender to the uses of the will; in which decree the court appears to have been influenced by the authority of *Noys* v. *Mordaunt* (419).

In *Cookes* v. *Hellier* (420), T. C. the copyholder, devised to his heir at law T. S. for life, with remainders over, making him also executor and residuary legatee of a large personal estate: the copyhold did not appear to be surrendered to the use of the will, but the court rolls were burned. T. S. took an enfranchisement of the estate, in which he was recited to be executor and devisee of T. C., and afterwards made a conveyance creating a term of years to raise money for payment of his debts after his death, the residue of the trust to be for the benefit of the remainder-man in the will of T. C. The remainder-man, after the death of T. S., filed this bill in Chancery against his devisee, to have a conveyance of the enfranchised estate, insisting that there was sufficient ground to presume a surrender, and that it was lost when the court rolls were burned, and that no one can dispute the will under which he has benefit. Lord Hardwicke (Chancellor) held, that the plaintiff was intitled to the estate, observing, that the surrender to will

(419) 2 Vern. 581. (420) 1 Ves. 234.

could not be presumed in equity upon a *casual* destruction of the court rolls, any more than at law; but that a person enjoying a benefit under a will, must abide by it *in toto*, and that in this case the devisee of T. S. was bound by his acquiescence; his lordship considered the description of T. S. in the deed of enfranchisement, and the circumstance of the term of years being made attendant on the inheritance, after the performance of the trust, for the benefit of the remainder-man, as evidence of T. S.'s intention to take under the will, and not as heir at law.

And where a person, seised of freehold and copyhold estates, devised all his real and personal estates to trustees, for the benefit of his wife for her life, and after her death, (subject to a few legacies,) to convey and transfer the same to his heir at law, and died without surrendering the copyhold to the use of his will; on a bill filed by the heir at law against the widow (the administratrix), for an account of the personal estate, and to have the trusts performed; and a cross bill by the widow to compel the heir to make his election, either to take under the will, or as heir at law, and if he elected to take as heir at law, to have a compensation out of his interest in the estates devised to him, equal to the interest in the copyhold which the testator intended to give her by the will; Lord Henley, Chancellor, was of opinion, that this was a case of election, and that the heir would disappoint the manifest intention of

the testator by claiming the copyhold; and held, that his election to take under the will, would be determined by an agreement he was said to have entered into with the widow about buying her interest in the personal estate (421).

In the last case there were peculiar expressions in the will, shewing the testator's intention to include his copyhold estates in the devise to his wife for her life, but in the absence of any such evidence of intention, a general residuary devise of real estates, will not raise a case of election as to copyholds (422).

And in *Wardell* v. *Wardell* (423), the testator having limited several copyhold estates upon certain trusts, after noticing that, for want of surrenders to will or other customary forms, they would descend to his son John as his heir at law, contrary to his intention, directed that his son should do all acts necessary for establishing the estates limited by the will, and that in case of his refusal, an estate devised to him in tail should cease, and the remainders thereupon expectant take effect in possession, as if his son were dead without issue, and that in the mean time, and until such refusal, the copyholds should be enjoyed according to his will. The customary estates not being devisable, it was insisted that

(421) *Unett* v. *Wilkes*, Amb. 430. And see *Attorney Gen.* and *Parkin*, 1 Dick. 422. Amb. 566.

(422) *Judd* v. *Pratt*, 13 Ves. 168, 15 Ves. 390.

(423) 3 Bro. Ch. Rep. 116.

the court could not decree a surrender; but Lord Thurlow, Chancellor, held, that though they were not devisable, yet as the testator might dispose of them, *and had marked his intention so to do*, that brought the case within the principle upon which the court supplied surrenders for payment of debts, or for younger children, and decreed the surrenders prayed by the bill.

And where a copyholder had surrendered part only of his copyholds, and the court were of opinion from the wording of the will, that he meant to devise such copyholds only as were surrendered, and which included certain entailed lands, the Master of the Rolls held, that the heirs could not take both under the will, and the estate that was entailed, but must be put to their election, on the principle, that no one claiming under a will, can contravene it (424).

But this doctrine does not apply to creditors; and those persons who come within the rule, are not bound by an election made under a mistaken impression.

In *Rumbold* v. *Rumbold* (425), under a devise of unsurrendered copyhold lands for the benefit of the wife and children, and the only provision for the eldest son and heir, being an annuity to be purchased with the monies arising from the sale of the estates; the heir was put to his elec-

(424) *Wilson* v. *Mount*, 3 Ves. 191. And see 1 Ves. 122, in *Allen* & *Poulton*.

(425) 3 Ves. 65.

tion, but was held not to be bound by having received half a year's payment of the annuity.

We have seen that a jointure of copyhold lands is no bar of dower at common law (426), but it was long since held, that a devise of copyholds in lieu of dower, might raise a case of election.

Where the bill was to stay a suit at law in a writ of dower, for that the wife had certain copyhold lands devised to her in lieu of her thirds at law, which she accepted of and enjoyed twenty years, and yet sought to recover dower of the freehold lands, and demurred to the bill because copyhold lands could be no bar of dower, the court held that she could not in conscience have both, and therefore must answer (427).

Another case applicable to this rule, and of considerable interest, is *Kidney* v. *Coussmaker* (428); there A. devised certain freeholds and copyholds, by the general terms of messuages, lands, &c. in

(426) *Ante*, p. 93. And see *Gladstone* v. *Ripley*, 2 Eden, 59, 60. 1 Swanst. 447. n. a.

(427) *Lacy et ux.* v. *Anderson et ux.* 24 Eliz. Choice Cases in Ch. 155-6. 1 Swanst. 398, 445. A.; Ib. 430. n. in *Gretton* v. *Haward*.

(428) 12 Ves. 136.; and see *Ardesoife* v. *Bennet*, 2 Dick. 463. S.C. (called *Wilson* v. *Andesoif*,) cited 15 Ves. 392. *Graves* v. *Forman*, cited 3 Ves. 67. *Pettiward* v. *Prescot*, 7 Ves. 541. *Blunt* v. *Clitherow*, 10 Ves. 589. *Streatfield* v. *Streatfield*, *Ca. temp.* Talbot, 176. *Herne* v. *Herne*, 2 Vern. 555. *Stratton* v. *Best*, 1 Ves. Jun. 285. *Whistler* v. *Webster*, 2 Ves. Jun. 367. *Sheddon* v. *Goodrich*, 8 Ves. 481, *Brodie* v. *Barry*, 2 Ves. & Bea. 130-3. Vide also *Dillon* & *Parker*, 1 Swanst. 370, 400, where most of the cases on the doctrine of election are collected.

trust to be sold, and the produce, after discharging mortgages, to be considered as part of the residue of his personalty; and, after confirming a post nuptial settlement on his wife, he directed, that if the messuages therein devised to her for life did not produce £400 per annum, the deficiency should be made up to her out of the produce of his personal estate, and declared that the provision should be in bar of dower and freebench: the testator gave the remainder in the freehold messuages his wife had for life, and all other his freehold and copyhold lands, &c. not before devised, to his two daughters, as tenants in common in tail, with cross remainders, with remainder to his own right heirs; and he further directed, that until sale of the first mentioned estates, the surplus rents, after payment of the interest of mortgages, should go in the same manner as the interest of his residuary personal estate; and the Master of the Rolls held, that the widow was entitled to her election, and that an inquiry must be made of what estates she was dowable, and that she should not be bound by the election, which it appeared she had made under a mistaken impression (429); but, that an objection taken, that the creditors could not defeat the provision for the wife, was not to be supported, the doctrine of election not applying to creditors: in this case it was also held, that not only specialty but simple contract creditors, by

(429) See Swanst. 407.

marshalling, may follow devised estates, if no estates descended, or if any, and they have been applied.

Where the intention is not sufficiently manifest for the purpose of supplying a surrender to will, it is deemed not to be so for the purpose of raising a case of election, *Judd* v. *Pratt* (430): the court in this case expressed its disapprobation of the practice of going into circumstances *dehors* the will, to get at the intention, as was done by Lord Hardwicke, in *Car* v. *Ellison*; and to shew, that it was a dangerous doctrine, and ought not to be admitted, cited the above cases of *Stratton* & *Best*, *Unett* & *Wilkes*, *Rumbold* & *Rumbold*, *Wilson* & *Andesoif*, and *Frank* & *Standish*, and also the case of *Tendril* v. *Smith* (431).

(430) 13 Ves. 168. 15 Ves. 390. and see *Read* v. *Crop*, 1 Bro. Ch. Rep. 492.

When a will is totally void as to freehold property the heir is not put to his election by accepting a legacy. *Hearle* v. *Greenbank*, 1 Ves. 299. S.C. 3 Atk. 695. *Carey* v. *Askew*, Belt's Ed. Bro. Ch. Rep. 2 vol. 58-9. S.C. 1 Cox. Ch. Ca. 241. *Sheddon* v. *Goodrich*, 8 Ves. 496. *Thellusson* v. *Woodford*, 13 Ves. 209. But it should seem, that if a condition is annexed to a legacy given to the heir, not to dispute the will, he must then elect between the inheritance and the legacy, *Boughton* v. *Boughton*, 2 Ves. 12. And see 1 Swanst. 405-6. 2 Ves. & Beam. 130, in *Brodie* v. *Barry*.

(431) 2 Atk. 85.

CHAP. V.

OF ADMITTANCE.

THE act of admittance is to be distinguished from the mere voluntary grant of the lord, and where the right of alienation is established by the custom of the manor, it is a form only, the surrender being the substantial part of the conveyance (1).

But as a surrenderee has no legal title until admission, it is usual in the case of absolute surrenders, to apply to be admitted at the court at which the surrender is made; and if made out of court, then at the next general court; and where the purchaser, from a desire to surrender the estate by way of mortgage or otherwise, would be inconvenienced by the delay of his admittance, he is allowed, by the custom of most manors, to call a special court.

Should the surrenderee die before admittance, his heir might claim to be admitted *as by descent* (2); but he would be compellable to give

(1) *Benson* v. *Scott*, 4 Mod. 251, 3 Lev. 385, Salk. 185, Comb. 233, Skin. 406, Carth. 275, 12 Mod. 49, Holt, 160. And see 3 Burr. 1543. 4 *Ib.* 1961-2. 5 *Ib.* 2785. Gilb. Ten. 438. n. 94.

(2) *Blunt* v. *Clarke*, 2 Sid. 61. Gilb. Ten. 220. 288. 5 Burr. 2786-7. Rob. Gav. b. 1.

effect to any devise or other disposition made by the ancestor of the equitable estate (3).

The power of the lord, or the chief steward of the manor, or his deputy, to admit a person into the tenancy, has already been discussed; and with respect, therefore, to the mere form of admission considered as a compulsory act, it may only be necessary to observe, that the lord is not bound to admit incapacitated persons, as aliens, outlaws &c., or persons not able to perform the usual services of fealty, suit of court &c., as corporate bodies (4); or to admit a tenant according to the express terms of a surrender, when it is contrary to the legal forms, or prejudicial to the lord's interest (5); for instance, if the surrender is to A. for his life, *without impeachment of waste*, the lord need only admit A. for his life, omitting the words making him dispunishable for waste.

The customary form of admittance should be

98. We have seen, that by the custom of some manors, the grantee of a customary estate passing by deed or surrender, must be admitted in the lifetime of the grantor, ante, p. 30.

(3) This is clearly so in the case of a purchaser, but it is not every equitable interest that is devisable, *Wainewright* v. *Elwell*, 1 Madd. Rep. 627. ante, p. 324.

(4) Co. Litt. 66, b. 2 Lord Raym. 864. in *Tonkin* v. *Croker*, 1 Watk. on Cop. 242. *Ante*, p. 125.

(5) *Car* v. *Ellison*, 3 Atk. 75. *post*. tit. Contingent Remainders. Nor is the lord bound to admit a person until the stamp duties and steward's fees are paid. See 48 G. 3, c. 149. s. 34. Appendix.

strictly pursued, as any deviation would probably be fatal at law, though open to relief in equity, if there were a sufficient consideration to induce the court to interpose (6).

A symbolical investiture was adopted at a very early period, and was not unusual even in grants of freehold property. The more ordinary symbol of possession is a rod, wand, or verge, and hence copyholders are frequently denominated "tenants by the verge" (7).

At the first general court, after the death of a copyholder is known to the homage, it should be presented, and the first proclamation should then be made for the heir, or other person claiming title to the land whereof such copyholder died seised, to come in and be admitted; and if no person attends, the proclamation is to conclude with a direction for a second proclamation to be made at the next court:—at the following general

(6) *Aspye* v. ——— Cro. Car. 597. 1 Watk. on Cop. 262.

(7) Co. Litt. 61. a. Sometimes a straw is used as the symbol of possession. Co. Cop. s. 39, Tr. 87.—Mr. Watkins, [1 vol. on Cop. p. 261.] says, "the "symbol was generally arbi- "trary, and often of the most "extravagant nature: a sword, "a lance, a knife, a glove, the "key of a church, and even a "drinking cup, or a lock of the "grantor's hair, was adopted "as the symbol of possession. "The rod, staff, or verge, how- "ever, was the most common; "and which most probably "was no other than that borne "by the officer of the court, "and consequently always at "hand: though its origin in- "deed had been deduced from "a more ancient and sacred "source. (See Stuart's View "of Soc. in Eur. b. 1. c. 2. "s. 4. p. 289. 4to. Ed.)."

court the second proclamation is to be made accordingly, and, in case of non-attendance, it should direct a third proclamation to be made at the succeeding court, when, should the heir, or other person intitled, not claim to be admitted after the third proclamation is made, a precept may be issued by the lord or steward to the bailiff of the manor, to seize the lands into the lord's hands for want of a tenant. (See the Forms of Presentment, Proclamation, and Precept, in the Appendix.)—Proclamations of this nature are in imitation of the feudal law, by which the feud was lost, unless the heir appeared within a year (8).

Although the heir is of full age, he is not bound to come into court to be admitted until presentment of the death of the ancestor, and proclamation be thereupon made (9); such presentment and proclamation being not merely for the information of the lord, but also to give notice to those that are intitled to be admitted, that the tenancy is vacant (10).

The presentment and proclamation may be general, and need not mention the name of the person to be admitted, though known, nor specify the particular estate of which the tenant died seized;

(8) Wright's Ten. 198. Gilb. Ten. 442. n. 100.

(9) Kitch. 246. *Rumney* & *Eve's* case, 1 Leo. 100. *Anderson* & *Hayward's* case, 3 *ib.* 221. S. C. 4 *ib.* 30.

(10) *Doe* d. *Whitbread* v. *Jenney*, 5 East, 532.

nor is it necessary, in order to seize *quousque*, to prove the proclamations *viva voce* (11).

When the heir or devisee appears in court to be admitted, either personally or by attorney, the formalities of proclamation are said to be unessential (12); but it is customary, and very proper, to proclaim the vacancy at the door of the court, in all cases, in order that any person disputing the right of admission, may come forward and state the grounds of his claim to fill the vacant tenancy.

It has been decided, that if the heir is beyond sea at the time of the descent, and of the proclamations, he is not bound by a custom, that the land should be forfeited for not coming after three proclamations (13); but if the heir leave the kingdom after the first proclamation, or perhaps at any time after the descent, unless it be evident that he had not notice of the vacancy, he is bound, as it would seem, by such a custom (14).

The entry or seizure of the lord for the forfeiture need not be proved, so that a written precept to seize does not appear to be necessary (15).

(11) *Doe* & *Jenney*, ante. See also *Earl of Salisbury's* case, (*Pateson* & *Danges*,) 1 Keb. 287. S.C. 1 Lev. 63. But see Scroggs, 98.

(12) 1 Watk. on Cop. 239.

(13) See the authorities ante, p. 30. (n. 63). *Underhil* & *Kelsey*, (*Sir Richard Lechford's* case,) Cro. Jac. 226. Kitch. 246.

(14) *Sir Richard Lechford's* case, 8 Co. 100. b. *Whitton* & *Williams*, Cro. Jac. 101. 1 Watk. on Cop. 236. Watk. Gilb. Ten. 230-1. *Ib.* n. 101.

(15) *Trotter* v. *Blake*, 2 Mod. 229. Bul. N. P. 107.

A custom to seize, as forfeited, if not claimed after three proclamations, or within a year and a day, (and which has been said to be a good custom) (16), would not be binding on a person under disability, as an infant or feme covert, any more than on the heir beyond sea (17).

It is very essential to observe, that the lord can only seize the particular share, in respect of which no person claims to be admitted (18), and that, as the neglect of coming in to be admitted is not a cause of forfeiture, without a special custom, the lord can enter and retain possession only *quousque* the heir, or the surrenderee (when he is compellable by custom to be admitted), demands admission (19).

In these instances great care should be taken by the steward to avoid a *general* and *unqualified* seizure, which would vitiate the whole proceedings, as they are, as in outlawry, *strictissimi juris*; therefore, where the entirety was seized *absolutely* by the lord, one of the co-heiresses being a feme

(16) See *Stowel* v. *Lord Zouch*, Plowd. 372. Gilb. Ten. 230. *Ante*, (n. 13.)

(17) Kitch. 246. Gilb. Ten. 230-1. *King* v. *Dilliston*, 8 Mod. 221. S.C. 1 Salk. 386. S.C. 1 Show. 31, 83. S.C. 1 Freem. 494. *ante*, p. 30; but, according to the opinion of C. B. Gilbert, such a custom would bind a feme covert, Ten. 231. And now as to infants and femes covert, see 9 Geo. 1. c. 29.

(18) *Doe* d. *Tarrant and others* v. *Hellier and others*, 3 T.R. 171-2.

(19) *Earl of Salisbury's case*, 1 Lev. 63. S.C. (*Pateson* v. *Danges*), 1 Keb. 287. *Titus* v. *Perkins*, Skin. 250. &c. *King* v. *Dilliston*, *sup.* *Roe* d. *Ashton* v. *Hutton and others*, 2 Wils. 162. *Doe* & *Hellier*, sup.

covert, and protected from forfeiture by the statute of 9 Geo. 1. c. 29. the heirs at law recovered in ejectment against the grantee of the lord; which verdict was confirmed by the court of King's Bench, upon a case reserved at the trial: the court, however, expressed an opinion, that the intention of the lord to seize *quousque*, might have been explained by other acts, but here the subsequent grant clearly shewed that he meant to seize absolutely (20).

The bailiff would not be justified in using force to obtain possession on the part of the lord (21), but if resistance be made to the execution of the precept, the lord may maintain ejectment (22).

If the heir or other person intitled to be admitted, is an infant or feme covert, the provisions of the act of 9 Geo. 1. should be pursued, ***but this is only when the party comes in by descent or by surrender to will***, and the act is not imperative on the lord, when infants or femes covert do not claim to be admitted under it (23).

The observations of Lord Eldon, in the above case of ***Lord Kensington*** & ***Mansell***, claim the particular attention of every court keeper, and suggest the propriety, whenever a power of appointment is created under a surrender of copy-

(20) *Doe* & *Hellier*, ante.

(21) 3 Leo. 99. ca 142.

(22) *Pateson* v. *Danges* (*Lord Salisbury's* case), 1 Keb. 287. Lex Cust. 17.

(23) *Lord Kensington* v. *Mansell*, 13 Ves. 240. See this case fully stated, ante, p. 220. et seq.

holds, of his assuming that the power has not been exercised, until an appointment is proved to exist.

When an admission is required in the case of an infant, whether claiming by descent or surrender to will or otherwise, it is the infant by his guardian, and not the guardian himself, that is to be admitted tenant to the lord (24).

An heir at law of a copyholder, being a compleat tenant before admittance against all persons but the lord, may enter and take the profits and maintain trespass, and bring ejectment, without having been admitted (25), and even surrender on payment of the lord's fine (26), and after

(24) Co. Cop. s. 56. Tr. 128. 1 Watk. on Cop. 272. Stat. 9 Geo. 1. c. 29. *Post.* title Guardianship.

(25) *Brown's* case, 4 Co. 22. b. *Clarke* v. *Pennifather*, 4 Co. 23. b. Co. Cop. s. 41. Tr. 94. Kitch. 119, 120. *Brown* v. *Dyer*, 11 Mod. 73, 99. *Knight* v. *Fortipan*, Cro. Eliz. 90. *Bullock* v. *Dibler*, Mo. 596, Poph. 39. *Frosel* v. *Welsh*. Cro. Jac. 403. S.C. 1 Roll. Rep. 411. S.C. Godb. 268. S.C. 3 Bulst. 214. *Stephens* v. *Baily*, Nel. Ch. Rep. 107. *York* & *Allein*, Lane, 20. *Rumney* & *Eve's* case, 1 Leo. 100. *Dancer* v. *Evett*, 1 Vern. 392. *Simson* v. *Gillion*, Noy. 172. 3 Lev. 327. 1 Comy. 241. 1 Mod. 120. *The King* v. *Rennett*, 2 T.R. 198. *Doe* & *Hellier*, 3 T.R. 169. Cowp. 741. Bull. N.P. 108. Ballantine's Ed. of Runnington on Eject. 390.

(26) *Brown's* case, sup. Co. Cop. s. 41. Tr. 94. Kitch. 162. *Brown* v. *Dyer*, sup. *Joyner* v. *Lambert*, Cro. Jac. 36. *Colchin* v. *Colchin*, Cro. Eliz. 662. *Wilson* v. *Weddell*, Yelv. 145. S.C. Brownl. 143. 3 Lev. 327. 1 Comy. 241. *Morse* v. *Faulkner*, 1 Anst. 11. 1 Watk. on Cop. 245, cites also *Dalrymple*, F.P. ch. 6. s. 3. p. 252-3. ante, p. 140, 153, 322.

his admittance he may bring trespass against the lord (27); but before his admission the heir is not intitled to be sworn on the homage, nor can he maintain a plaint in the nature of an assize (28).

It would seem that an heir at law who is refused admittance, shall be ter-tenant against the lord, though the lord loses his fine (29).

And in *Doe* d. *Burrell* v. *Bellamy and another* (30), Bellamy, the lord of the manor, having seized after the usual proclamations for the heir to come in and be admitted, and afterwards demised the land to the other defendant, the heir applied to the steward to admit him, and upon his refusal to do so in the absence of the lord, the heir brought his ejectment, and had a verdict; and on a motion in the Court of King's Bench to set the verdict aside, on the ground, that the lessor of the plaintiff should have tendered himself at one of the lord's courts, the rule was refused; Dampier, J. observing, that what had been said by the steward was a dispensation with the plaintiff's attendance at the lord's court. This case, it must be observed, does not affect the question of the right of the steward to admit out of court upon a surrender (31), as the lessor of

(27) Co. Litt. 60. b. 1 Watk. on Cop. 45. And see *Scott* v. *Kettlewell*, 19 Ves. 335. n. *Ante*, p. 211.

(28) Co. Cop. s. 41. Tr. 94. Kitch. 119. Gilb. Ten. 287. 5 East, 532.

(29) 1 Comy. 245. "The lord is only trustee for the heir, and is bound to admit him." Gilb. Eq. Rep. 77, in *Mason* v. *Day*.

(30) 2 Mau. & Sel. 87.

(31) *Ante*, p. 128 et seq.

the plaintiff was an heir at law, and his admittance therefore unnecessary, except in respect of the lord's fine.

The admittance is merely as between the lord and tenant (32); if, therefore, the customary heir should die before admission, his heir might enter (33), and such death will not prevent the widow from being endowed (34), nor the husband from being tenant by the curtesy (35); and we have seen, that if the heir die after having entered, there shall be a *possessio fratris*, even before admittance (36).

It is only by special custom, that the lord can compel a surrenderee to come in and be admitted, as the tenancy continues full by the surrenderor (37), though by custom (38) the lord may seize after three proclamations, if the surrenderee should not appear, in the same manner as in the case of an heir, but the neglect of the tenant for life or years, will not prejudice those in remainder (39).

No notice whatever can be taken by the lord

(32) *Knight* v. *Bate*, Cowp. 741.

(33) *Clarke* & *Pennifather*, 4 Co. 23. b.

(34) *Ante*, p. 91.

(35) *Ante*, p. 96.

(36) *Ante*, p. 56-7. And see Watk. on Desc. 69.

(37) *Ante*, p. 153. Until admittance the surrenderee hath neither *jus in re*, nor *jus ad rem*. 1 Show, 87. 3 Mod. 226.

(38) As to the effect of a release of right from the surrenderee to the surrenderor, when such a custom exists, vide ante, p. 247.

(39) *Baspool* v. *Long*, Yelv. 1. S.C. Noy, 42. S.C. Cro. Eliz. 879. 1 Roll. Abr. 568. Cop. G. pl. 5. 6 Vin. Abr. Cop. (S.c.) pl. 8. Sir T. Raym. 404. *Rastal* v. *Turner*, Cro. Eliz. 598. And see 6 Vin. Abr. Cop. (E. d.) pl. 11.

of a mere covenant to surrender, though he is bound to admit the assignee of a covenantee, under a surrender made to such assignee by the covenantor (40): But the assignee of a surrenderee, I conceive, cannot compel admission, without satisfying the lord such fine as he would have been intitled to by the admission of the surrenderee, especially where there is a custom in the manor, by which the lord might compel the surrenderee to come in and be admitted (41).

The lord is not compellable to admit by attorney (42) (except in the case of femes covert, and of infants taking by descent or surrender to will,)(43), and this is the natural consequence of the rule, that fealty cannot be done by attorney (44); but it is usual to admit a surrenderee by attorney, and not to put him to the expence of appointing one by deed (45), if admittance is the only object, as the court may name any person present to act for the surrenderee, and to receive seizin on his behalf; and although the principal should be beyond sea, his consent given at any subsequent period, will

(40) *The King* v. *the Lord of the Manor of Hendon and his Steward*, 2 T.R. 484. 1 vol. Watk. on Cop. 57. *ante*, p. 266-7.

(41) *Ante*, pp. 246, 267.

(42) Co. Cop. s. 35. Tr. 80. Co. Litt. 66. b. 68. a. *ib.* n. 5. *Combe's* case, 9 Co. 76. b. *Floyer* v. *Hedgingham*, 2 Ch. Rep. 56. It was held in the case of *Hildyard* v. *S. S. Company* & *Keate*, 2 P.W. 77, that an admittance upon a surrender, made by virtue of a forged letter of attorney, would be void. But see *Ashby* v. *Blackwell*, Amb. 503.

(43) 9 Geo. 1. c. 29. (Appendix.)

(44) Post. Ch. 7. Co. Cop. s. 35. Tr. 80.

(45) See *Combe's* case, sup.

constitute it a good admittance (46). In the late case of *Wymer* v. *Page* (47,) Lord Ellenborough expressed his decided opinion, that a party might appoint an attorney for the purpose of suffering a recovery, as of common right, unless there was an express custom to the contrary.

We have seen that before admittance a surrenderee cannot surrender, even if the surrender to him has been presented, and that his subsequent admittance will not make such surrender valid by relation, and that the steward's acceptance of the surrender from the first surrenderee, is not an admittance of him (48).

But as the admittance upon a valid surrender has relation to it, the surrenderee may recover in ejectment upon a demise laid between the date of the surrender and the admittance, and it will be sufficient if the surrenderee obtains admittance at any time before trial (49).

If the surrenderee is in possession, he may maintain trespass before admittance, being a possessory action only (50), though it was formerly thought otherwise (51); and, after admittance, he may have an action of debt of all the rent (52).

(46) *Blunt* v. *Clark*, 2 Sid. 61-2. Ib. 6 Vin. Cop. (M. b.) pl. 5.

(47) Stark. 9. vide also 47 Geo. 3. Sess. 2. c. 8. Append.

(48) *Ante*, p. 151-2. Post, 'Admittance by Implication.'

(49) *Ante*, p. 152.

(50) *Holdfast* d. *Woollams* v. *Clapham*, 1 T. R. 601.

(51) *Berry* v. *Greene*, Cro. Eliz. 349. ante, p. 154.

(52) *Collins* v. *Harding*, Cro. Eliz. 606. 622. Mo. 544. 13 Co. 57-8. Lane, 33.

The heir of an unadmitted surrenderee, and the devisee of an unadmitted devisee, have no title at law before admission, the legal title remaining in the surrenderor in the first case, and in the heir of the first testator in the second: but there is this distinction in the effect of their admittance, in favour of such heir at law; namely, that his admission has relation to the surrender, equally with the admittance of the surrenderee himself, but the admission of the devisee of an unadmitted devisee, gives no legal title without a surrender from the heir of the first testator; the latter position was established in *Doe* d. *Vernon* v. *Vernon and others* (53), which case arose out of the residuary devise in the will of Thomas, Earl of Strafford, (*vide Roe* d. *Conolly* v. *Vernon*, 5 East, 51.) (54): and the court observed, that the first devisee, (the mother of the plaintiff,) never was in fact admitted under the surrender by her father to the uses of his will, and held, that her devisee could not be in a better situation than herself, and that his admittance could not give him a title, but merely clothed him with a *legal* title to the possession, if he had before a *legal* title to the estate; and that supposing him to have an equity (55), a court of law could not help him.

(53) 7 East, 8. But I apprehend, in such a case, that the heir of the first devisee might claim to be admitted, although the lord could not compel him.

(54) *Ante*, p. 183.

(55) The late Vice Chan-

The above case of *Doe* & *Vernon*, more particularly shews the propriety of establishing a deduction of legal title to every copyhold on the face of the court rolls, which is, indeed, in every instance, the best criterion for the guidance of the lord or steward, when he entertains a doubt as to the rights of different parties; here it is seen, that the chain of legal title was broken from the surrender to the use of the Earl of Strafford's will, the next act on the rolls of the manor being an admittance of the devisee of a person not in the seizin; and when a court of equity should have obliged the heir of the Earl of Strafford to surrender to such devisee, then, and not before, the legal title would be regularly deduced on the rolls.

An application to a court of equity is generally thought to be absolutely necessary, when the heir refuses to give effect to the intention of the ancestor; for, although a manor court is to some purposes a court of equity as well as law, yet it does not possess the powers, by which the superior courts may compel a trustee to unite the legal estate to the equitable; but, according to the case in 1 Leo. (56), if the copyholder should not obey the decree of the manor court, it is in the power of the lord to seize and admit the rightful tenant.

cellor decided, that a devisee of an unadmitted devisee, has no title even in equity, *Wainewright* v. *Elwell*, 1 Madd. Rep. 627. ante, p. 324.

(56) P. 2. ca. 2. *Ante*, p. 116, 117.

It has long been settled, that the admittance of the tenant for life or years is the admittance of all in remainder, and, therefore, that the interest of the remainder-man is the subject of a surrender (57).

But the surrenderee of the particular tenant, and the heir or surrenderee of a remainder-man or reversioner, must be admitted (58).

And a custom for tenants in remainder to come in and be admitted, and pay a fine, has been held to be good (59).

If a copyholder surrenders to particular uses which determine, even if he parts with his whole estate, limiting the reversion in fee to himself; or surrenders on condition, and the condition is performed by the surrenderor, or broken by the surrenderee, as the case may happen to be, he is in of his old seizin, and no admittance therefore can be requisite (60).

(57) See the cases, *ante*, p. 150. (n. 51.) *Dell* & *Higden*, Mo. 358. *Brown's* case, 4 Co. 22. b. *Fitch's* case. ib. 23. a. *Jurden* v. *Stone*, Hutt. 18. *Warsopp* v. *Abell*, 5 Mod. 306. *Blackborn* or *Batmore* or *Blackborough* & *others*, v. *Greaves and others*, 2 Lev. 107. 1 Mod. 102, 120. 3 Keb. 263, 329. 1 Vent. 260. *Barnes* v. *Corke*, 3 Lev. 308. *Earl of Bath* v. *Abney*, 1 Burr. 206. Cowp. 713. *Doe* d. *Whitbread* v. *Jenney*, 5 East, 522. 7 East, 22. *Lord Kensington* v. *Mansell*, 13 Ves. 246, 253. But see Co. Cop. s. 56; Tr. 130. Gilb. Ten. 194.

(58) *Gyppyn* v. *Bunney*, Cro. Eliz. 504, Mo. 465. *Auncelme* & *Auncelme*, Cro. Jac. 31. Watk. Gilb. Ten. 416-17. (n. 77.) Dy. 137. pl. 26. Fearne's P. W. 103.

(59) *Gyppyn* & *Bunney*, *Barnes* & *Corke*, *Doe* & *Jenney*, sup.

(60) *Margaret Podger's* case, 9 Co. 107. a. *Bulleyn* & *Graunt's*

But if by the surrender to uses the copyholder takes back a life estate, or other particular interest, then I apprehend he must be re-admitted to give effect to the surrender (61).

JOINT-TENANTS are seized *per mie et per tout*, therefore the admission of one is the admittance of all of them, and if one die or release to the others, no new admittance is necessary (62); these rules apply to the admission of one of several devisees in trust, but it is to be recollected, that if one refuse to act, the entire legal interest will vest in the codevisees in trust, *Reid* v. *Shergold*, 10 Ves. 380. ante, p. 326.

COPARCENERS are but as one heir, consequently one admission will suffice for all; and when they are admitted in coparcenary, it would seem that they may release to each other as joint-tenants may do (63). But coparceners are sometimes ad-

case, 1 Leo. 175. S.C. Cro. Eliz. 148. Co. Cop. s. 56. Tr. 129. *Thrustout* d. *Gower* v. *Cunningham*, 2 Sir W. Bl. 1046.

(61) *Roe* d. *Noden* v. *Griffiths* or *Griffits*, 1 Sir W. Bl. 605. S.C. 4 Burr. 1952.

(62) Co. Cop. s. 35. Tr. 82. *ib.* s. 56. Tr. 130. Co. Litt. 193. a. 318. a.; *ib.* sect. 286, 288. *Wase* v. *Pretty*, Winch. 3. *Mortimore's* case, Het. 150. Gilb. Ten. 289, 330. Kitch. 240. *Roe* d. *Ashton* v. *Hutton and others*, 2 Wils. 162. ante, p. 151.

(63) Litt. s. 241. Co. Litt. 67. a. 163. b. *Morrice* v. *Prince*, Cro. Car. 521. 3 Leo. 13. ca. 30. Gilb. Ten. 73. and n. 174. 1 Watk. on Cop. 277-8-9.; but see 3 T. R. 165.

mitted severally, and then one cannot release to the others.

On the death of one of several coparceners, the survivors have no right except by descent; and therefore the heirs of a deceased coparcener must be admitted (64).

But if one *joint-tenant* or one *coparcener* will surrender to the others, the surrenderees would, I apprehend, be in of a new seizin, and consequently must be admitted to the portion so surrendered.

TENANTS IN COMMON are altogether different from either joint tenants or coparceners; there is no survivorship between them, and as they take and transmit several estates, they cannot release to each other, and the heirs of each must be duly admitted (65).

BARON AND FEME.—As the husband, in right of his wife, is seized of her freehold estates during the coverture, so he becomes tenant to the lord of her copyhold lands, and is to sit on the homage and perform the services to the lord; but being seized in right only of his wife, without any secession from the tenancy, no admission is

(64) Co. Litt. s. 286. Co. Cop. s. 56. Tr. 130. Gilb. Ten. 478. n. 174. 1 Watk. on Cop. 272, 279.

(65) Co. Cop. s. 56. Tr. 130. *Fisher* v. *Wigg*, 1 Lord Raym. 631. S.C. 1 P.W. 21. S.C. 1 Salk. 391. 1 vol. Watk. on Cop. 280. *Attree* & *Scutt*. 6 East, 484. S.C. 2 Smith 458.

requisite (66): if the wife took by descent, it would seem that the husband may even enter in her right, before her admittance (67).

When the customary curtesy or dower is of the whole of the copyhold, and not of a portion only, the law, I apprehend, casts the possession on the husband or wife, the same as in curtesy, at common law, or in dower *ad ostium ecclesiæ*, or *ex assensu patris*, where assignment is not necessary, the lands being ascertained; and as in these cases the heir is prevented from entering and acquiring seizin, and the estate to be considered, therefore, a continuation of the seizin of the deceased wife or husband, I would submit that no admittance of the survivor is requisite; but when the curtesy or dower is of a portion only of the copyholds, it would seem that the husband surviving the wife, or the wife surviving the husband, cannot enter without assignment by the heir, and consequently, that admittance would be requisite, the possession or seizin of the husband or wife being broken by the right of entry in the heir (68).

(66) *Hedd* v. *Chalener*, Cro. Eliz. 149. Calth. 52. Co. Cop. s. 56. Tr. 129. Gilb. Ten. 289, 291.; *ib.* 461. n. 139.

(67) 1 Vol. Watk. on Cop. 273. cites Watk. on Desc. 53-4. (n.) *ante*, p. 96.

(68) *Chapman* & *Sharpe*, 2 Show. 184. *Jurden* v. *Stone*, Hutt. 18. *Howard* v. *Bartlet*, Hob. 181. Cro. Jac. 573. 1 Lev. 20, 172. Gilb. Ten. 373. n. 25. *Rennington* v. *Cole*, Noy, 29. Watk. on Desc. 101. to 105. *Ante*, p.p. 87-9, 93, 96. But in some manors the custom is, that the wife shall be admitted to her dower of all the land,

It must, however, be borne in mind, that this distinction, if a correct one, is to be supported only by the argument, that admittance *cannot be necessary* when there is a continuation of the possession of the deceased husband or wife, which is the case when no mesne seizin can take place; and that, by the same rule, *it is necessary*, when the entry of the heir would create a chasm between the death of the wife or husband, and the possession of the survivor, and does not draw to it the sanction of an important difference between curtesy and dower at common law; namely, that the tenant by the curtesy holds immediately of the lord, and is tenant to him, whereas the dowress holds of the heir, and is attendant on such heir for the third of the services (69); for in copyhold cases the tenant, whether in fee or for life, or any less

and then the heir is not admittable during her life, *Borneford* v. *Packington*, 1 Leo. 1. 6 Vin. Cop. (H. e.) pl. 1.

In *Forder* v. *Wade and others*, 4 Bro. Ch. Rep. 525, where the widow of *cestui que trust* had entered as guardian to her son; Lord Loughborough, on the question whether the widow was dowable, said, "Then to "consider it as the case of a "copyhold, the widow was not "entitled to enter till she had "paid her fine and been ad-"mitted: *admission only makes* "*her title*, and in this case till "admitted, *non constat* whe-"ther she would be admitted. "Even a dowress, who has not "entered, need not be named "in a recovery." And in decreeing that the widow was not dowable, being of a trust estate, his lordship added, "If I am "right *that the freebench would* "*not exclude the heirs seisin*, it "would be immaterial whether "the widow was entitled to "freebench or not."

(69) Watk. on Desc. 104. Gilb. Ten. 173.

estate, holds immediately of the lord by the customary rents and services.

But the presumed necessity of an admittance to the customary curtesy or dower, when it is of a portion only of the copyhold, may of course be controlled by a special custom, that such admittance shall not be requisite, or that the curtesy or dower shall be of a portion of the *interest* in the land, and not of the *land* itself, or of a portion of the rent only (70).

The necessity, in former times, of the lord's consent to the marriage, and the payment in some instances of a fine on marriage, are used by Mr. Watkins as arguments against the necessity of a new admission of the wife on the death of the husband, or of the husband on the death of the wife, when dower or curtesy is allowed by the custom of the manor (71); but it must be recollected that the fine which the lord exacted for his license or consent to the marriage of his tenant, was of a very different nature to a fine on an admittance of a copyholder, and where no such fine can be demanded, the argument deduced from the right to exact it surely ceases.

And it is not to be forgotten that my Lord Coke says (72), " So if a copyhold descendeth,

(70) Col. Jurid. 2 vol. 382, Customs of Westsheen, &c. and see Gilb. Ten. n. 97. ante, p. 86.

(71) 1 Vol. on Cop. 275. N. 136. to Gilb. Ten. p. 460.

(72) Cop. s. 56. Tr. 128. And see *Wheeler's* case, 4 Leo. 240.

" and the lord admitteth the heir, where by the " custom of the manor the wife is to have dower, " and the husband is to be tenant by the curtesy " of a copyhold; either of them shall be ad- " mitted, and shall pay a fine to the lord."

When the wife is intitled to a copyhold for a term of years, it would seem that, as her interest in chattels real vests absolutely in the husband, if he survives her (73), and as there is no change of tenancy, the husband being the lord's tenant during the coverture, it is not necessary that he should be admitted (74).

EXECUTOR AND ADMINISTRATOR. But it was held, in the *Earl of Bath* v. *Abney* (75), that the executor or administrator of a termor is compellable to be admitted: and though it was said *arguendo* in that case, that the lord is not obliged to admit for terms of years; yet no authority was quoted to support the proposition, and it appears contrary to all principle as well as practice (76).

(73) Co. Litt. 46. b. *ib.* 300. a.: *ib.* 351. a. and n. (1.)

(74) *Hauchet's* case, Dy. 251. a. S.C. (called *Dedicott's* case,) 3 Leo. 9. Co. Cop. s. 56. Tr. 129. Gilb. Ten. 333.

(75) 1 Burr. 206.

(76) *Gravenor* & *Ted*, 4 Co. 23. a. Co. Cop. s. 47. Tr. 110. *Blackborn* or *Batmore* or *Blackborough* v. *Greaves*, *ante* (n. 57); but in *Dedicott's* case, 3 Leo. 9, it was said by Brown and Dyer, Js. against the opinion of Weston, J. that executors shall take a term of years without any admittance: and see *Heydon's* case, Mo. 128. Gilb. Ten. 290. Cumb. 445. *Otlery Monastery* case, 4 Leo. 118.

POWER. When a power of appointment, or of sale, of copyholds, is given by a copyholder to another by his will or otherwise, under a previous surrender to uses, it is not the person in whom the power of appointment is vested, but the appointee that is to be admitted, the former having no interest (77).

BANKRUPTCY. And as the persons to whom the copyhold estates of a bankrupt are conveyed by the commissioners, pursuant to the powers vested in them by certain statutes (78), are to be considered appointees within the above rule, it follows that such appointees are to be admitted: if, therefore, the copyholds are included in the bargain and sale from the commissioners to the assignees, the assignees must of course be admitted; and so, consequently, must any purchaser of them, if he would acquire the legal estate (79). With a view, therefore, to avoid the payment of a double fine, copyholds are gene-

(77) *Beal* or *Brent* v. *Shepherd*, Cro. Jac. 199. *Holder* d. *Sulyard* v. *Preston*, 2 Wils. 400. Post. tit. 'Fine,' [POWER].

(78) *Ante*, p. 100.

(79) Where a commission was superseded on the ground that when it issued the petitioning creditor's debt was not due, it was held that the assignees ceased to have the legal estate, and could not enforce a previous contract for sale of copyhold lands, which had been abandoned on the objection to the validity of the commission, although another commission had issued, under which the same persons were chosen assignees. *Bartlett* v. *Tuchin*, 6 Taunt. 259. ante, p. 261.

rally excepted out of the bargain and sale of the bankrupt's estates to the assignees, and by which no inconvenience can arise, with reference to crown debts, as an extent of the crown does not affect copyholds (80): this expedient was first suggested by Lord Chancellor Hardwicke, in the case of *Drury* v. *Man* (81), who observed, that the commissioners, where the creditors could meet with a purchaser of the copyhold, might convey to him in the first instance; and though there might be occasion sometimes for temporary assignments, for the better preserving the bankrupt's estate, yet commissioners were not obliged by the clause in the 5th Geo. 2. (82), *relating to temporary assignments*, to appoint an assignee of the whole estate, because the words are in the disjunctive, immediately to appoint one or more assignee or assignees of the estate or effects, *or any part thereof*.

A doubt has been suggested as to the power of excepting copyholds in the assignment from the commissioners to the *assignees chosen by the creditors*, the act of 5 Geo. 2. c. 30. s. 26, having provided that "the commissioners, or the major part of them authorised, shall assign every such bankrupt's *estate and effects* unto such person or persons as the major part in value of such creditors, according to the several debts then proved, shall choose as aforesaid" (83).

(80) *Ante*, p.p. 60, 105.
(81) 1 Atk. 96 Co. Tr. 128. 130-1.
(82) C. 30. s. 30.
(83) 2 Montag. Bpt. Laws.

But upon an objection lately taken to a title of copyholds, which had been sold by the assignees, that the commissioners had executed the bargain and sale to the vendee *in the first instance*, instead of surrendering to the assignees, and then the assignees surrendering to the purchaser, the present Vice Chancellor, after a very full argument, (wherein it was admitted that considerable doubts existed in the profession on this point, notwithstanding the decision of Lord Hardwicke), held, that the objection could not be sustained (84).

The admittance of the vendee or appointee of commissioners of bankrupt, has relation to the bargain and sale or instrument of appointment, in the same manner as the admittance of a surrenderee relates in point of interest to the date of the surrender, and with precisely the same consequences, so that the bankrupt ceases to be a copyholder on the inrolment of the bargain and sale (85). But if the bankrupt should die before

(84) Ex parte *Holland*, in re. *Harvey*. [The author is indebted for this authority to Mr. Rose.]

(85) *Parker* v. *Bleake*, Cro. Car. 568. S.C. W. Jones, 451. Cooke's Bank. Laws, 1 vol. 285-6. *Ante*, p. 88, 152. It is from the *inrolment*, and not from the *date* of the bargain and sale, that the estate of a bankrupt passes, the former not having relation to the latter as in a bargain and sale inrolled under the stat. Hen. 8. *Elliot* & *Danby*, 12 Mod. 3. *Perry* v. *Bowes*, 1 Vent. 360. S.C. T. Jones, 196. *Bennet* v. *Gandy*, Carth. 178. *Doe* d. *Esdaile* v. *Mitchell*, 2 Mau. & Sel. 446.

[INSOLVENT DEBTOR'S ACT. See Post. tit. '*Fine*.']

any appointee claimed to be admitted, I apprehend the lord might seize *quousque* after three proclamations.

ADMITTANCE BY IMPLICATION. It was formerly thought, that the steward's acceptance of a surrender, from the surrenderee of a copyhold, would be an implied admittance (86), and for which the cases of *Baker* or *Barker* v. *Denham* or *Dereham* (87), *Gyppyn* v. *Bunney* (88), *Colchin* v. *Colchin* (89), and *Rawlinson* v. *Green* (90), appear to have been relied upon as authorities; but it was ably shewn by Lord Ellenborough, in the case of *Doe* & *Tofield* (91), that such a surrender is void, and that the above authorities do not support the position, it appearing by the supplement to Lord Coke's Copyholder, s. 4. that if the point in question arose at all in *Baker* & *Denham*, it was ruled the other way; that *Gyppyn* & *Bunney* was the case of a surrender by a remainder-man, the tenant for life having been admitted, and which was the admis-

(86) *Elkin* v. *Wastall*, 3 Bulst. 232. 1 Roll. Ab. 505. X. pl. 1. 6 Vin. Cop. (E. b). Co. Litt. 60. a. n. 2. 1 vol. Watk. on Cop. 269-70.

(87) Sty. 145. 1 Mod. 102.

(88) Cro. Eliz. 504.

(89) *Ib.* 662.

(90) Poph. 127. S.C. (called *Rawlinson* v. *Greeves*,) 3 Bulst. 237. S.C. (called *Robinson* v. *Greves*,) Bridgman's Rep. 81.

(91) 11 East, 249. 2 Bl. Com. 368. and see *Wilson* v. *Weddell*, Yelv. 145. S.C. 1 Brownl. 143. *Dixie's* case, 24 Eliz. cited Co. Litt. 60. a. n. 2. and in 11 East, 252. ante, p. 152-3.

sion of all in remainder (92); that *Colchin* & *Colchin* was the case of an heir, and who may surrender before admittance on satisfying the lord his fine (93); and that the surrender in the case of *Rawlinson* & *Green* was clearly proved to be void by an able argument in the report in Bridgman.

The case of *Rawlinson* & *Green* appears to have been decided on the ground, that no admittance could be implied, either from the presentment of the surrender, the acceptance and entry of it by the steward, or the delivery of a copy of such entry to the surrenderee, those acts by the steward being ministerial only, and not *of necessity* implying an admittance.

But it would seem, by the argument referred to, that if the lord himself had accepted the surrender, it would have implied an admittance (94).

And it has been held, that the lord's saying to a surrenderee, that he agrees to the surrender, and that he shall be his tenant, is a sufficient admittance (95).

And also, that the lord's acceptance of rent

(92) *Ante*, p.p. 150, 153.

(93) *Ante*, p. 346.

(94) Bridgm. 83. 3 Bulst. 239-40.; and see *ib.* 232. 4 Burr. 1955. 5 Burr. 2780, et seq. 11 Mod. 70. Gilb. Ten. 282-3. but see ante, p. 121-2, and Qu. as to the effect of the lord's acceptance of a surrender from a surrenderee of copyholds, *out of court?*

(95) *Elkin* v. *Wastell*, 3 Bulst. 232. *Rosewell* or *Frosel* v. *Welsh*, *ib.* 219. S.C. Cro. Jac. 403. S.C. Bridgm. 52. S.C. 1 Roll. Rep. 415. S.C. Godb. 268. 1 Roll. Abr. 502. (M.) pl. 4. Ib. 505. (X.) pl. 2.

from the surrenderee, *if expressly accepted from him as a copyholder*, is a good admittance (96).

The lord's assessing a fine upon the surrenderee is not a virtual admittance (97), though the acceptance from him of a fine or of fealty it appears would be so (98).

It has been doubted, whether the lord's avowing on the heir for rents or services, would be tantamount to an admission (99); yet the better opinion seems to be, that it would not (100).

But if the lord or steward should swear the surrenderee on the homage, it would, I apprehend, amount to an admittance (101).

Admittance does not in itself constitute a possession, but only gives the party the means of obtaining possession if he has a right to it (102);

(96) *Rosewell* or *Frosel* v. *Welsh*, ante, p. 364; but it is observable, that in the report of this case in Cro. Jac. it is said to have been held, that the acceptance of rent from the surrenderee does not give any interest until the surrender is presented in court; and that in *Baker* v. *Denham*, Sty. 146. Bacon, J. doubted whether the lord's acceptance of rent amounted to an admission, Gilb. Ten. 282-3. 4 Mod. 252. *Ante*, tit. Presentment of Surrender, p. 295, 298.

(97) *Brown* v. *Dyer*, 11 Mod. 73. 6 Vin. Cop. (G. b.) pl. 19.

(98) 3 Bulst. 239. Dy. 292. a. pl. 68. Gilb. Ten. 283. 6 Vin. Cop. (B. b. 2.) pl. 4. Calth. Read. 63.

(99) 1 Vol. Watk. on Cop. 246-7. Gilb. Ten. n. 135. p. 459.

(100) Kitch. 87. Co. Cop. s. 41. Tr. 94. Gilb. Ten. 287.

(101) 4 Burr. 1955. 1 Vol. Watk. on Cop. 246.; and see further as to admittance by implication, Gilb. Ten. 282-3. 6 Vin. Cop. (B. b. 2.) pl. 4. Com. Dig. Cop. (G. 4.) 5 Burr. 2780 et seq.

(102) *Hasset* v. *Hanson*, Win. 67.

and as no person can recover in ejectment without having been admitted, except indeed an heir at law (103), the lord is not justified in refusing admission where there is a colourable title (104).

A grant wrongfully made is wholly void, and the lord or steward may afterwards admit according to the surrender (105).

And if there is any variation between the surrender and admittance, the estate will be according to the surrender; as if the grant be to the surrenderee and a stranger, the whole shall enure to the surrenderee; or if the surrender be absolute, and the surrenderee is admitted on condition, the condition is void (106).

And again, if the copyholder surrenders for life, and the lord admits in fee, the surrenderee has but an estate for life, for he is in by force of the surrender (107); and the admittance, in what-

(103) The late case of *Roe* & *Loveless*, 2 Barn. & Ald. 453, has decided, that in the absence of any special custom to the contrary, a grant in reversion operates as an admission of the grantee, who having a perfect legal title may maintain ejectment when his reversionary estate falls into possession.

(104) Lofft, 390. 11 East, 250. *Ante*, p. 347.

(105) Kitch. 162. Co. Cop. s. 41. Tr. 92. *Westwick* v. *Wyer*, 4 Co. 28. b. *Baddeley* v. *Leppingwell*, 3 Burr. 1543. *Allin* & *Nash*, Noy, 152. S. C. 1 Brownl. 127. *Hether* & *Bowman*, Sty. 462. 3 Leo. 210. ca. 274.

(106) Co. Cop. s. 41. Tr. 92-3. *Westwick* & *Wyer*, *Allen* v. *Nash*, sup. Kitch. 171.

(107) *Westwick* & *Wyer*, 4 Co. 28. b. *Bunting* v. *Lepingwel*, 4 Co. 29. b. *Baddeley* v. *Leppingwell*, sup. 4 Burr. 1961. Kitch. 171. Gilb. Ten. 255. Calth. Read. 61.

ever manner, always enures according to the title (108).

Yet where a copyholder made a surrender to the use of himself for life, remainder to his wife for life, remainder to the baron and feme in tail, remainder to the heirs of the body of the baron, and after the death of baron and feme, the eldest son and heir of the body of the surrenderor was admitted generally as heir, but not to the estate tail, and then mortgaged and died leaving issue whom the lord admitted, the mortgagee recovered in ejectment, it being held that the legal title to the fee-simple which descended from the father to the eldest son, remained in the son until admittance under the surrender made by the father (109).

It is said, that if the uses of the admittance are more extensive than the surrender, the admission may, in respect of the lord's interest, operate as a new grant (110); but when a person is admitted in a particular character, with reference to a for-

(108) 3 Bulst. 240. *Lane* & *Pannel*, 1 Roll. Rep. 317. 438. *Church* v. *Mundy*, 12 Ves. 431. But Lord Coke, in his Comp. Cop. s. 41. (Tr. 93.) says, "If I surrender with the "reservation of a rent, and the "lord admits, not reserving a "rent, or reserving a less rent "than I reserved upon the sur- "render, this admittance is "*wholly void*: but if the lord "reserveth a greater rent, then "is the reservation void only "for the surplusage, and the "admittance so far current as "it agreeth with my surren- "der." And again, "If I "surrender upon condition, and "the lord omits the condition, "the admittance is *wholly* "*void*."

(109) 6 Vin. Cop. (G. b.) pl. 19. Hill. 5 Ann. B.R.

(110) 4 Leo. 88. ca. 186. 1 Freem. 246. 1 Watk. on Cop. 52. (n. *p.*) Gilb. Ten. n. 119, 120.

mer grant, and no new estate is in the contemplation of the parties, the admission, if void, shall not operate as a grant in respect of the interest of the admitting lord.

So in Zouch, on the demise of *Forse* v. *Forse* (111), it was held, by the Court of King's Bench, that the administrator of a grantee of a copyhold *pur autre vie*, who had no title in that character, as there cannot be a general occupant of a copyhold (112), could not recover in ejectment under an admittance by the lord, as upon a substantive grant of a new estate.

It must, however, be recollected, that a release by a person intitled to be admitted, to one who is admitted wrongfully, will enure by way of extinguishment (113); and that if no estate is mentioned in the surrender, it may, in some cases at least, be implied from the admittance (114).

The power of compelling the lord to admit a copyholder was first assumed, it would seem, by the courts of equity (115), and now a mandamus at law will lie, as we shall see hereafter (116);

(111) 7 East, 186.; and see *Right* d. *Dean and Chapter of Wells* v. *Bawden and others*, 3 East, 260.

(112) *Ante*, p. 61, 106.

(113) *Ante*, p. 247.

(114) *Ante*, p. 161. Gilb. Ten. 255.; but see Co. Cop. s. 41. Tr. 93.

(115) 4 Co. 24. a. 28. b. *Ford* v. *Hoskins*, Cro Jac. 368. S.C. Mo. 842. S.C. 1 Roll. Rep. 125. Gilb. Ten. 291. Post. Ch. 13.

(116) *Post.* Ch. 13. And in *Lord Montague* v. *Dudman*, 2 Ves. 398, Lord Hardwicke said, that the Court of Chancery had no jurisdiction to grant an injunction to stay proceedings on a mandamus.

but neither the surrenderor or surrenderee can maintain an action against the lord for refusing admittance (117).

The lord cannot bring a bill in equity against copyholders to compel them to be admitted, although, if there is a confusion of lands, he may have a bill of discovery; but his remedy is by proclamation and seizure, or under the statute of 9 Geo. 1. (118).

So permanently established is the estate of the copyholder, that it cannot be prejudiced by any act of the lord; if, therefore, the lord grants the freehold of a single copyhold to a stranger, so that a court cannot be held, such grantee of the freehold interest will be bound by the copy, and the title of the heir of the copyholder will be compleat without admittance (119): Again should the lord oust his lawful tenant, the party injured shall have trespass (120), or may main-

(117) *Ford* & *Hoskins*, ante, (n. 115.) *Phillibrown* v. *Ryland*, 8 Mod. 352. 2 Vent. 27. Carth. 492, in *Groenvelt* v. *Burnell*, Gilb. Ten. 291.; but see *Gallaway's* case, cited 3 Bulst. 217, and 5 Burr. 2769. Lex Cust. 158.

(118) *Clayton* v. *Cookes*, 2 Atk. 449. *Ante*, p. 344-5.

(119) *Bell* or *Beale* & *Langley*, 2 Leo. 208-9, 4. ib. 230. *Ante*, p.p. 13, 14.

(120) Co. Litt. 60. b. Co. Cop. s. 51. Tr. 118. 1 Watk. on Cop. 45. Br. tenant per Copie, &c. pl. 13, cites 21. E. 4. 80. Lex. Cust. 15. 1 Leo. 4, 4 Leo. 118, *Otlery Monastery* case. *Scott* v. *Kettlewell*, 19 Ves. 335. n. And an action of trespass lies against the lord for cutting down trees, when, by custom, they belong to the tenant. Co. Cop. s. 51. Tr. 119. ante, p. 211. (n. 164).

tain an ejectment (121), or even indict the lord (122).

(121) *Rennington* v. *Cole*, Noy, 29. It has been said that a writ of right would lie against the lord; per *Danby* C.J. of C.B., Br. tenant per copie, &c. pl. 10, cites 7 E. 4. 19; but we shall see hereafter, that a copyholder cannot implead a stranger by the king's writ, and the same reasons would seem to hold in the instance of a lord's putting out his lawful copyhold tenant: The remedy in such a case would appear to be in equity, as it would be inconsistent for the tenant to sue the lord in his own court. See *Baker* & *Wich*, 1 Salk. 56. *Brittle* v. *Dade* [or *Bade*], Ib. 186, 1 Lord Raym. 43. Mr. Watkins says, 'If, however, any dispute arise between lord and tenant, it must, of necessity, be referred to the courts above, as the lord must not be both party and judge.' Vide 2 vol. on Cop. 35. And see ib. p. 1, 2.

(122) *Ante*, p. 211, 213.

CHAP. VI.

OF THE FINE PAYABLE ON ADMITTANCE TO A COPYHOLD ESTATE.

A FINE is due on the act of admittance only; consequently where there is no necessity for admittance, no fine can accrue to the lord (1).

The fine as well as the expences of the surrender and admittance, must be paid by the purchaser (2); and it has been decided, that a covenant to surrender copyholds at the costs of the vendor, is not broken by non-payment of the fine on admission, the title being perfected by admittance (3).

In many manors, but more particularly in the tenant-right estates in the north of England, a fine is due on the change or alteration of the lord, as well as on the change or alteration of the tenant (4); but then the admission is for the joint lives of the tenant and the admitting lord, so that

(1) Co. Cop. s. 56. Tr. 127, &c. *Hobart* & *Hammond*, 4 Co. 28. a. (cites *Bacon* v. *Flatman*.) *Attorney General* v. *Sands*, 3 Ch. Rep. 36. Kitch. 240. Gilb. Ten. 218. 2 Wils. 401. 3 Burr. 1543. *Rex* v. *the Lord of the Manor of Hendon*, 2 T. R. 485. *Graham* v. *Sime*, 1 East, 634.

(2) *Drury* v. *Man*, 1 Atk. 95, Saunders's Ed. Sugden's Vend. & Purch. 352. [5th Ed.]

(3) *Graham* v. *Sime*, sup.

(4) *Lowther* v. *Raw*, 2 Bro. P. C. 451. *Tenants of Gaddesden* v. *Carey*, Toth. 165.

the tenancy is determined on the death of either: and this fine is not restricted to those claiming by descent; but in the case of *the Duke of Somerset* v. *France et al.* (5), it was adjudged, that the husband, who was tenant for life under the provisions of a marriage settlement, was entitled to a fine upon the death of his wife, the last admitting lady.

And where by custom a fine is due on the change of the lord, I apprehend, if the lord of the manor *pro tempore* be a termor for years only, the admission must nevertheless be for the joint lives of him and the tenant, as a fine on the change of the lord can only be due when such change is by the act of God, for a custom to have a fine on every change or alteration of the lord, whether by death or otherwise, would be bad (6).

In some manors fines are certain, as 6*s*. 8*d*. for the admission to each house, or to every acre of land (7), in others they are uncertain, or at the will of the lord; but the fine on admission to copyholds of inheritance, or for lives when renewable, even if arbitrary, must be reasonable (8); and two

(5) 1 Stra. 654. S. C. Fortesc. 41.

(6) Co. Litt. 59. b. cites *Armstrong's* case. Gilb. Ten. 292. Litt. Rep. 233. Cary, 9. Lex. Cust. 161-2. Contra as to fines due on the change or alteration of the tenant. See *Earl of Bath* & *Abney*, 1 Burr. 206. Cary, 9. Co. Litt. 59. b.

(7) Kitch. 200, 201-2.

(8) *Willowe's* case, 13 Co. 1. *Dalton* v. *Hamond* [or *Hobart* & *Hammond*] Cro. Eliz. 779. Mo. 622. 4 Co. 27. b. *Jackman* v. *Hoddesdon*, Cro. Eliz.

years' *improved* value of the land (9), deducting quit rents, but not land-tax (10), is the full extent which the courts will allow the lord to demand in the exercise of this arbitrary power (11): and in

351. 1 Roll. Rep. 75. Gilb. Ten. 219. Co. Litt. 60. a. cites *Stallon* v. *Brady*, P. 1 Jac. C. B. And see *Wharton* v. *King*, 3 Anst. 673.

(9) The fine is to be set in all cases according to the improved value. *Halton* v. *Hassel*, 2 Stra. 1042.

(10) *Grant* v. *Astle*, 2 Doug. 722.

(11) *Morgan* v. *Scudamore*, 2 Ch. Rep. 134. Rep. Temp. Finch, 154. *Wharton* v. *King*, 3 Anst. 674. And see *Gittings* v. *Browe*, Toth. 164. *Lake* v. *Jetherell*, ib. *Atwood* & *Apsley*, ib. *Allen* v. *Abraham*, 2 Bulst. 32. Co. Litt. 60. a. (N. 1.) In the case of *Dow* & *Golding*, Cro. Car. 196, the lord demanded two years and a half's value, but the court thought it unreasonable, and that a year and a half's improved rent was high enough; but see *Stoner* v. *Smith*, Toth. 164. *Tenants of Accledon* v. *Kinnesley*, ib. It appears by Mr. Watkins's note on the case of *Morgan* & *Scudamore*, in his 1st vol. on Cop. Ten. p. 310, that Lord Nottingham also considered a year and a half to be a proper maximum in common cases, but allowed two years' value in that particular case, the grant being for 99 years, renewable within one year after the expiration of the term; and the court appearing to have been influenced by the dictum, that the lord could not demand a fine of the executors of a copyholder for years, but the contrary, it must be recollected, was determined in the *Earl of Bath* & *Abney*, *post*. *Vide* also *Middleton* v. *Jackson*, 1 Ch. Rep. 33, Toth. 164; and *Popham* v. *Lancaster*, 1 Ch. Rep. 96, Toth. 164; (in which the Court of Chancery deemed an improved year's value a proper fine on admission to tenant-right estates;) vide also *Monsier* v. *Ducket*, Toth. 164. *Cooper* alias *Stayning* v. *Blunt*, ib. *Tenants of Gaddesden* v. *Carey*, ib. 165. *Fox* v. *Huddleston*, ib. *Watson* v. *Maine*, ib. *Blackwall* v. *Low*, Cary, 77. And see *Ne-*

order to keep within the limits of the rule, and in a discreet distinction between the admittance to copyholds of inheritance on a sale and descent, operating equally to the advantage of the lord and tenant, it is, I believe, usual for the lord to take not more than a year and three quarters' value on a descent, and a year and half's value on a purchase.

But the rule by which the lord is precluded from insisting on more than two years' value for the fine of admission, is confined, I apprehend, to those cases where he is compellable to admit, and the heir of the copyholder is subject to a fine on the devolution of the estate, and is not applicable to voluntary grants, nor to cases where by the custom remainder-men must be admitted; or where the purchaser only, and not his heir, is subject to a fine (12); nor to cases where a fine is payable on the first purchase only within the manor, as in the manors of Harrow on the Hill, Croydon, Lambeth, and Richmond (13); nor to copyholds for lives, where there is no right of renewal, nor even to renewable copyholds for lives, where the cus-

ville v. *Albany*, Toth. 165. *Beare* v. *Seymor*, ib. *Lord Gerrard* v. *Parker*, ib. *Elrington* v. *Whetstone*, ib.

(12) *Doe* & *Hellier*, 3 T. R. 164. 1 Watk. on Cop. 308.

(13) 1 Watk. on Cop. 308. 1 Freem. 496. 1 Show. 86. 2 Watk. on Cop. Appendix, 2nd Ed. p. 370. Dolben, J. in 1 Freem. 496, cited *Pinsent's* case, in which five years' value was set for a fine in the manor of Croydon, and held to be a reasonable fine, and that in such a case the lord might have set seven years' value.

tom allows the copyholder to put in more than one life, for there each life is considered as a separate admission, and it would be unjust to the lord if it were otherwise, and quite an inconsistency, as a copyhold for lives would in that case be more valuable than a copyhold of inheritance, where the heir or devisee is subject to a fine on admission.

The custom of most manors on a renewal of copyholds for lives, is to take a year and a half's value for one life, for two lives as much and half as much as the fine for one, and for three lives as much and half as much as the fine for two (14); but it is evident that a custom to take two years' value for the first life, and so in proportion for the additional lives, would be deemed reasonable.

And as the rule, with respect to the two years' value, is relaxed in favour of the lord on admissions for lives, so I apprehend it would be where a copyholder of inheritance surrenders or devises to several persons as joint-tenants; otherwise, as the admission of one joint-tenant is the admission of his companions, there would be a very ready mode of defeating the lord of his advantages from fines, by introducing an unlimited number of lives into the tenancy.

(14) *Earl of Bath* v. *Abney*, 1 Burr. 207, 217, marg. where it is said, "The fine for two lives, is the sesqui of that taken for one; and the fine for three is sesqui of that taken for two, by the usage of this manor," [viz. *Stoke Newington, Middlesex.*]

I am not aware that this question has yet been agitated, but entertaining a strong inclination of opinion, that the case of joint-tenants is also an exception to the above rule, I feel myself bound to state it on laying a work of this nature before the public; and this opinion receives a considerable degree of sanction from the practice of a half-fine being usually paid by a remainder-man, when a fine is due from him by the custom of the manor; and I believe no question has ever been made of the reasonableness of the custom (15).

It may certainly be contended against this conclusion, that the admittance of a tenant for life is the admittance of all in remainder (16); and also, perhaps, that it is not in the power of the lord to prevent a copyholder of inheritance from carving out his estate in such manner as he may think proper, but I submit that this argument is very far from proving, that the rule in question would be held to extend to the case of an admission of joint-tenants, for it is to be recollected, that the heir or surrenderee of a remainder-man or reversioner must be admitted and pay a fine, but that

(15) Kitch. 241. and see *Roe* v. *Hutton*, 2 Wils. 162. 1 Watk. on Cop. 309, 311.

Sir Edward Northey, Attorney General, being consulted as to what fine a steward might set upon admitting five or six devisees in trust of a copyhold estate, gave the following opinion. "If the trustees were "to be admitted, the usual me- "thod is to pay a full fine for "the first life, and half as much "for every other life, they be- "ing taken as admissions of "lives in reversion." MSS.

(16) And see 1 Watk. on Cop. 297-8. (n. d.). [2nd Ed.]

joint-tenants do not transmit any estate to their heirs, and that they may release to each other, and so effect a transfer of their interests without any change of tenancy, and consequently without intitling the lord to a fine.

But these observations are applied only to the amount of the fine, for it is clear that one fine only is due on the admission of joint-tenants, however unlimited their number may be.

The case of *Grant* & *Astle* (17), of which I propose to give a full extract, is very important and interesting on the question of fines at will:—It was an action of assumpsit in the Court of Common Pleas, by Astle, as lord of the manor of Great Tay, in Essex, against Grant, for the fines assessed on his admission to eight different customary tenements, and which fines were stated to be arbitrary. Grant was admitted in fee, on the death of his father, to all the above copyholds, upon which admission a fine of 98*l.* 18*s.* 4*d.* was assessed, which appeared to be two years' improved value of the tenements, after deducting 2*l.* 19*s.* 8*d.* for two years' quit rents.

Astle not having deducted any thing for land-tax, Grant, who pleaded the general issue, paid 84*l.* 5*s.* 8*d.* into court upon the common rule.

The cause was tried before Ashhurst, J. at the assizes for Essex, when a *general* verdict was found for Astle, with 98*l.* 18*s.* 4*d.* damages, subject to the opinion of the Court of Common Pleas,

(17) 2 Dougl. 722. (ubi sup.)

on a case in which the question was, whether the lord of the manor was bound to allow any sum for land-tax out of the fine,—if he were, a nonsuit was to be entered, and if not, the verdict to stand.

By Lord Loughborough, "This question was "truly considered as of great concern to the "public at large. It has undergone a very deli- "berate examination, and we are all of opinion "that the lord of the manor is not bound to "make any deduction for the land-tax out of a "fine due for admission on a descent, which is "the present case.

"The grounds which led us to this determina- "tion, lie in a very narrow compass.

"In the first place, the land-tax is annual, and "however probable its continuance may be, there "can be no legal presumption as to the future "intentions of the legislature, and there can be "no deduction, by anticipation, of an uncertain "future burthen.

"In the second place, the tax, though com- "monly called a tax upon land, is not, in its na- "ture, a charge upon the land. It is a tax upon "the faculties of men, estimated, first, according "to their personal estate; secondly, by the offices "they hold; and, lastly, by the land in their oc- "cupation. The land is but the measure by "which the faculties of the person taxed are "estimated, and where it is intended by the "legislature that the burthen should not ultimately "rest upon the person charged, a power of de-

" ducting is given him by the act; as in the case " of rents, and other certain outgoings. But no " deduction is allowed for fines which are uncer- " tain. In the last place, this claim being new, " and there being no precedent nor instance to " support it, the usage of almost a century is a " strong proof that no such deduction ought to " be made, and amounts to a contemporary and " permanent exposition of the land-tax acts, in " favour of the lord.

" These are the reasons which have weighed in " the opinion of the court, to determine this case " in the manner I have stated."

And, after the observations on the antiquity of copyhold tenure, which will be found in the early part of this Treatise, Lord Loughborough proceeds, " A fine to be paid on the change of a te- " nant is almost a constant incident of a copyhold " estate, and it does not seem to have been long " before the end of the reign of Queen Elizabeth, " that courts of law interposed to moderate the " exercise of the lord's right to a fine, where the " custom had left the amount of it uncertain; for " it is pretty remarkable, that a question on this " subject was depending in the 36th and 37th of " Queen Elizabeth, in the Court of King's Bench, " and in this court at the same time; you will " find it in 1 Rolle's Abr. 507, and in the Con- " temporary Reporters. The question was this, " under what circumstances a refusal to pay a

" fine should amount, in a court of law, to a for-
" feiture of the copyhold estate.

" It was contended upon the part of the lord,
" that the mere non-payment of the fine assessed
" would amount to a forfeiture.

" That proposition appeared too strong, even in
" a court of law; however, the Court of King's
" Bench, in the 36th of Elizabeth, held, that after
" the demand of a fine by the lord, and the refusal
" of the tenant to pay, though the fine should be
" unreasonable, the estate should be forfeited.

" This court, a term or two afterwards, in the
" case of *Jackman* v. *Hoddesdon*, reported in Cro.
" Eliz. 351. held, that in such case, there was no
" forfeiture. The Court of King's Bench, (as has
" been just stated,) had held the contrary, but the
" opinion of this court prevailed; and in the 43rd
" of Eliz. in the case of *Hobart* v. *Hammond*, re-
" ported in 4 Co. 27. b. the Court of King's
" Bench, referring to the case of *Jackman* v. *Hod-
" desdon*, in the Common Pleas, varied their idea,
" and held, that the refusal to pay an unreason-
" able fine was no forfeiture of the estate. From
" the manner in which the report of that case is
" stated, and the anxiety with which the judges
" support the proposition, one would be apt to
" conclude it had not been of great antiquity.

" A few years afterwards, in the 6th of King
" James, in *Willowe's* case, 13 Co. 1. this point
" again occurred, and the law was not then taken

" to be so settled, as for the court simply to say, " the point is so; but the report states a great " deal of reasoning and argument to support the " position, that the judges not only might, but " ought, either upon the facts appearing upon a " demurrer, or upon evidence to go to a jury, to " determine what was a reasonable fine; and in " that case the court held, that *two* years' value " was an unreasonable fine.

" Thus then the matter rested; the fine was to " be assessed by the lord; and whether it was " reasonable or unreasonable, was a question for " the consideration of the court and jury, and it " would obviously be subject to much fluctuation " and uncertainty. To prove upon a trial, the " annual improved value of land, and then to " calculate how much of that value should be " paid for a fine, was likely to be attended with " so much dissatisfaction, that recourse would " frequently be had to the Court of Chancery, " which had always relieved against the forfei- " ture, and taken upon itself, without a jury, to " determine what should be a reasonable fine.

" Lord Keeper Coventry, in the 5th of Charles I. " and again in the 12th of the same reign, (1 Chan. " Rep. 18 or 33. (18) and *ibid.* 51 or 96.), (19) " held, that one year's improved value was a rea- " sonable fine, guarding the decree, that one " year's value should not be counted a fine cer- " tain, but referrable to the discretion of the

(18) *Middleton* v. *Jackson.* (19) *Popham* v. *Lancaster.*

" court whether it was reasonable, and that " the payment was then directed because it was " reasonable.

" In the 29th of Charles II. in the year 1677, " Lord Nottingham, in the case in 2 Rep. in " Chan. 135. (20), held, that *two* years' value was " a reasonable fine, and at the time of this deter- " mination, in 1677, two years' value was not " a much higher payment than one year's value " had been at the time of Lord Coventry's deter- " mination. The interest of money had been " reduced, and, from that and other causes, the " value of land had risen. One year's value " might be nearly as large, as an *aliquot* part of " the selling price of land in the 5th of Charles I, " as two years' value at the time of Lord Not- " tingham's determination. From that time to " the present, the idea of two years' value being a " reasonable fine, in the case of a fine arbitrary, " (or, in the more proper phrase, *arbitrable*) (21), " has prevailed uniformly, and the adhering to " this rule has been a matter of very great con- " venience, though it cannot be said to be a mat- " ter of strict justice.

" Two years' value, the interest of money being " six *per cent.* as at the time of Lord Notting- " ham's determination, is a much larger propor- " tion of the selling price of a copyhold estate, " than the same number of years purchase, the " interest of money being at five and four *per*

(20) *Morgan v. Scudamore.* (21) Cro. Eliz. 351.

"*cent.* But to follow the variations of price "would create confusion in this property, would "occasion a depreciation of it, and is not the "true interest of a copyholder. Public conve- "nience, therefore, that great source of law and "justice, has established the authority of the "rule laid down by Lord Nottingham; and it is "to be observed, that the decision was not above "eighteen years prior to the first land-tax act. "From that time to the present hour, not an in- "stance can be found, where there has ever been "a deduction from the two years' value, (then "fixed as the utmost amount of a fine,) upon "account of the land-tax.

"It seems, therefore, to me, much better for "the interest of copyhold tenants, and for the "public advantage, as there is a great deal of "that property in the kingdom, that the fine to "be paid upon the renewal of a copyhold estate "should be strictly kept to that sum which has "subsisted now above a century; namely, two "years' improved value, without any deduction "except for quit-rents, which can hardly be "called a deduction, for the lord must allow that "which he has received, or is to receive."

The Court of Common Pleas having decided in favour of Astle, he remitted the 84*l.* 5*s.* 8*d.* upon the record, and took judgment for the difference. Grant then brought a writ of error, and assigned several errors on the first count of the declaration, and, among others on the second count, the

following one: namely, *that one gross sum had been assessed, and was claimed as a fine for divers distinct and separate customary tenements; whereas, by the law of the land, separate and distinct fines ought to be set and assessed upon each several and respective tenement.*

By Lord Mansfield, "I have exceedingly la-
"mented, that ever so inconvenient, and ill-
"founded a rule should have been established, as
"that, where there are several counts, entire da-
"mages, and one count is bad, and the others not,
"this shall be fatal; upon the fictitious reasoning,
"that the jury has assessed damages on all, al-
"though they, in truth, never thought of the dif-
"ferent counts, but the verdict was so taken, from
"the inadvertence of counsel in the hurry of *nisi*
"*prius*. And what makes this rule appear more
"absurd is, that it does not hold in the case of cri-
"minal prosecutions; for when there is a general
"verdict of *guilty* on an indictment consisting of
"several counts, if any one of them is good that
"is held to be sufficient. But in civil cases the
"rule is now settled, and we have gone as far as
"we can, by allowing verdicts in such cases to
"be amended by the judge's notes. That might
"have been done in this instance, in an earlier
"stage of the proceedings, but cannot now after
"judgment."

By Buller, J. "The court may grant a *venire*
"*de novo*. A good cause of action is shewn in
"the first count; and that it is true, appears by

" the verdict; but the plaintiff has also had da-
" mages assessed to him on a count in which he
" has not shown any cause of action. The court,
" under these circumstances, may send the case
" back to have damages assessed only on that
" count on which, in point of law, he is intitled
" to recover" (22). And a *venire de novo* was awarded.

The cause came on to be tried on the *venire de novo*, before Ashhurst, J. at the Lent Assizes for Essex, 1782, when the jury, upon the evidence, thought that the sum of 46*l.* 17*s.* 6*d.* stated to have been assessed as a fine on the admision to the first of the eight tenements, exceeded two years' value, and that the fine ought only to have been 46*l.* 4*s.* 3*d.* The learned Judge was of opinion, that the plaintiff could not have a verdict for that smaller sum, but must recover either to the exact amount of the fine declared upon, or not at all. The plaintiff's counsel insisting strongly that he might recover according to whatever the jury should find the two years' value to be, a verdict was found for the plaintiff by consent, on that ground, with liberty to enter the verdict for the defendant, if the court should think the plaintiff was bound to prove the exact sum laid. This question was argued before the Court of K. B. in Easter Term; and in the same term Lord Mansfield delivered the opinion of

(22) But it has been decided, that a fine may be recovered under a general *indebitatus assumpsit, post.*

the court in favour of the defendant, observing, that "on the evidence it appeared that the fine "should have been only 46*l.* 4*s.* 3*d.*, that being "the full amount of two years' value, and the "question now is, whether the plaintiff can, in "this case, recover a smaller sum than the fine as-"sessed. Two things are necessary parts of this "custom: 1. The fine must be assessed: 2. It "must be reasonable. The lord says in his decla-"ration, that he has assessed 46*l.* 17*s.* 6*d.* for a "fine, and that this sum was *reasonable*, and "brings his action for that precise sum. The "question for the jury was, whether 46*l.* 17*s.* 6*d.* "was a reasonable fine, and they found it was "not, therefore the plaintiff is not intitled to re-"cover. He has not assessed two years' value, "but a precise gross sum; and by what rule he "went in assessing that sum, does not appear "upon the record. It is true he has averred, "that the estate is of a large yearly value; viz. "of the yearly value of 23*l.* 8*s.* 9*d.* but that is no "averment of what the yearly value really is; "and the averment in this case is totally imma-"terial. It would have been enough if the plain-"tiff had stated that he had assessed the sum of "46*l.* 17*s.* 6*d.* as a fine, and that such sum was "reasonable; and it would *then* have been matter "of evidence, just as it was *on this record*, whe-"ther the sum assessed exceeded two years' value "or not, *because that is the established criterion* "*whether it be reasonable or not.* In the present

" case the duty is numerically certain, for it is not " assessed with relation and in proportion to the " annual value, but is fixed at a gross sum. The " only case on this precise subject is *Titus* v. *Per-* " *kins* (23). The Chief Justice there says, if the " lord demand more than he ought he may make " his demand *de novo*, for the Judge, in case of " a *greater* demand than is due, ought not to ad- " judge as much as is due to the lord, and bar him " for the residue, but ought to adjudge against him " for the whole, and that his entry was tortious, *if* " *he had entered*, and put him to a new demand. " This," continues Lord Mansfield, " goes to the " demand itself, and is not confined to the case of " a forfeiture, and there is no such distinction " made in that case;" (which the reporter ob- serves had been insisted on at the bar.) " The " gist and foundation of every action must be " proved as laid in the declaration. This action " is for a certain precise sum, and, under the cir- " cumstances of the case, it could not be brought " in any other way." And after noticing the cases cited for the plaintiff, which the court deemed inapplicable, Lord Mansfield thus concludes, " We give no opinion, whether the lord might " not have assessed a fine for two years' value, " and made that solely the foundation of his de- " claration. In *Titus* v. *Perkins*, a custom to

(23) [Or *Perkins* v. *Titus*.] Skin. 247-9. Carth. 12. 3 Lev. 249, 255. 3 Mod. 132. Comberb. 43. 2 Show. 507. ca. 463. 1 Freem. 494. ca. 669. Lilly's Ent. 371.

" have a year's value, generally, for a fine, was " held to be good. But however that might be, " it is very clear that the evidence here did not " support the declaration, for the plaintiff has no " right to any thing but the sum assessed; the " duty arises upon the assessment; and *that*, by " the evidence, is proved to have been illegal " and void. Therefore the case stands as if no " assessment had ever been made, and, conse- " quently, the plaintiff's right to demand a fine " is not yet complete."

The certainty of a fine is to be decided by the court rolls of the manor (24); and length of time will not establish certainty if a variation can be proved by more ancient entries, the law presuming that a fine is uncertain until the contrary be shown; nor will a few contradictory instances be evidence either way (25).

Yet, in order to constitute certainty, it is not requisite that the amount of the fine should be positively fixed; but it will be sufficient if it is relatively certain: so it has been held, that a custom for every copyholder, upon his admittance, to pay a year's value of the land, as it

(24) *Allen* v. *Abraham*, 2 Bulst. 32. *Hopton* v. *Higgins*, Toth. 167. *Burraston* v. *Walsh*, *ib.* And see *Pincheon* v. *Keeling*, 9 Car. Toth. 111.

(25) *Trotter* v. *Blake*, 2 Mod. 231. *Lord Gerard's* case, Godb. 265. pl. 365. Lex Cust. 159, 160.

is worth at the time of admission, is a good custom (26).

It is already stated that a fine is due on the act of admittance only, which I shall now proceed to exemplify, premising that by *special custom* the heir may be entitled to admission without payment of any fine (27); and that although the lord cannot compel the heir to accept admission, yet it is not in his power by waiving it, to defeat the lord of his fine; for if he does not come in within the period prescribed by the custom of the manor, the lord may seize the lands into his own hands, until he requires to be admitted (28); or in case of infancy or coverture, when the heir claims *by descent or surrender to will*, the lord may recover the fine under the provisions of the 9 Geo. 1. c. 29. (29).

No fine can be due from the guardian of an infant, as it is the infant and not the guardian that is to be admitted (30).

(26) *Titus* v. *Perkins*, ante, p. 387.

(27) 3 T. R. 164.

(28) *Clayton* v. *Cookes*, 2 Atk. 449. And see *Wheeler* v. *Honour*, 1 Sid. 58. Gilb. Ten. 406. (N. 136.) *ante*, p. 342. And by the custom of some manors the non-appearance is a forfeiture, *North* v. *Earl & Countess of Strafford*, 3 P. W. 151. *Ante*, p. 343-4.

(29) In all other instances of infancy and coverture, the lord may seize *quousque*; and in the case of infants or femes covert intitled to the benefit of the act, but who do not demand admission, the lord has the option of seizing *quousque*, or of appointing a guardian or attorney for the purpose of admittance under the powers of the act, *ante*, p. 345.

(30) *Ante*, p. 346.

We have seen that it is not in the power of the lord to compel a surrenderee to come in and be admitted, except indeed by special custom; so that when no such custom exists, the lord cannot have a fine of a surrenderee, if he will dispense with admission; and although it may be contended, that as the lord may be compelled to admit a surrenderee, so he ought in his turn to have the power of enforcing the surrender for the purpose of receiving the fine of admission, yet it is to be recollected, that the tenancy continues full by the surrenderor; and if he die, his heir, I apprehend, must be admitted and pay a fine, or the lord might seize *quousque* after three proclamations (31).

And for this reason I am induced to suppose, that on the death of the surrenderee before admission, the lord must admit his heir on payment of a single fine only. The contrary was stated *arguendo* in the *King* v. *Coggan* (32), on a motion for a mandamus to compel the lord to admit the heir of a surrenderee, but the court appear to have entertained a different opinion, or, at least, must have doubted on the point, the rule for a mandamus being made absolute, '*upon the heir's undertaking to pay such fine or fines as should be due to the lord.*'

If the surrenderee is compellable by custom to

(31) *Ante*, p. 348.; but see 1 Watk. on Cop. 291.

(32) 6 East, 431. And see S. C. 2 Smith's Rep. 418.

be admitted, he must pay a fine on his admission (33); and when a person is desirous of being admitted under a forfeited condition, as in the case of a conditional surrender by way of mortgage, where the money is not paid at the appointed time, a fine will accrue to the lord on such admission, and also on the re-admission of the surrenderor (34).

The steward's acceptance of a surrender from an unadmitted surrenderee, does not amount to an implied admittance, so that it cannot intitle the lord to a fine (35).

As the admittance of the tenant for life or years is the admittance of all in remainder, the limitations forming together only one estate (36), but one fine can be due, which the lord may assess on the tenant of the particular estate, or he may apportion the fine between him and the remainderman (37).

(33) *Fawcett* v. *Lowther*, 2 Ves. 302.

(34) *Ante*, p. 245. And when there is a custom for copyhold lands to be extended, the extendor, upon his admittance, must pay a fine, Co. Cop. s. 56. Tr. 128. 1 New. Abr. 479.

(35) *Ante*, p. 152, 350.; but it is supposed that the lord's acceptance of the surrender would amount to an admittance, and if so, a fine would become payable, *ante*, p. 364.

(36) *Ante*, p. 353. Kitch. 240-1.

(37) *Batmore* & *Graves*, 1 Vent. 260. But a person having a rent charge out of the estate is not contributory towards the fine, see *Maxwell* v. *Ashe*, fully stated by Sir William Grant, M. R. in *Moody* v. *Matthews*, 7 Ves. 184; vide also *Nightingale* v. *Lawson*, Belt's Ed. Br. Ch. R. 1 Vol. 444. (n. 7).

Mr. Watkins in the second

So when the particular tenant and the remainder-man join in a surrender, as their interests form but one estate, one fine only is due from the surrenderee (38).

In *Lord Kensington* v. *Mansell* (39), Lord Eldon said, that when tenant for life comes on behalf of himself and all in remainder, if the lord does not take the fine he cannot afterwards insist on it from those in remainder, but he may apportion it.

It appears, however, that the person in remainder is not compellable to pay his proportion

edition of his Treatise on Copyholds [1 Vol. p. 811, n.], makes a Qu.? Whether if tenant for life (where there are remainders over) pay the whole fine, it will not be a lien on the lands; and refers to the principle of fines on renewal of leases, citing *Adderley* & *Clavering*, 2 Bro. Ch. Rep. 659. *Stone* & *Theed*, ib. 243. *Nightingale* & *Lawson*, sup.

The rule now is that a tenant for life shall contribute to a renewal fine, in proportion only to the interest actually derived by him. See *Pickering* v. *Vowles*, Belt's Ed. Br. Ch. Rep. 1 vol. 199. (n. 4), cites *Nightingale* & *Lawson*, *Stone* & *Theed*, sup. *White* v. *White*, 9 Ves. 554, &c. *Allan* & *Backhouse*, 2 Ves. & Bea. 65. *Lord Montfort*, v. *Lord Cadogan*, 17 Ves. 485.

(38) Co. Cop. s. 56. Tr. 130. Kitch. 242. *Attree* v. *Scutt*, 6 East, 484. S. C. 2 Smith, 449. Gilb. Ten. 416, N. 77. 6 Vin. Cop. (X. b.) pl. 3, 13.

(39) 13 Ves. 246.; but see *ib.* 252, where Lord Erskine is reported to have intimated during the argument, that the effect of remitting the fine upon the admission of the tenant for life, could not be that the remainder-men were discharged. See a full statement of the case of *Lord Kensington* & *Mansell*, ante, p. 220, &c.

of the fine until his estate comes into possession (40).

And where the custom is for the remainder-man to be admitted and pay a fine (41), the fine is not payable until the death of the tenant for life (42).

As it would seem that the lord cannot remit the fine to a tenant for life, and charge it on the remainder-man, the lord or steward should always demand a fine on the re-admission of a person who settles his copyhold, taking back a life interest or other particular estate.

It would certainly appear that a fine is due in such a case, if the copyholder should claim to be admitted, but the lord could not compel admission, except by special custom; yet, on the death of the surrenderor, he might seize *quousque*, if neither the heir nor the remainder-man came in to be admitted, after three proclamations (43).

And if a copyholder in fee surrenders to the use of another for life, or for a term of years, without any further limitation, or limiting the reversion in fee to himself, the lord is to have a fine of the *cestui que use* on his admission; but as the surrenderor is already admitted, being in of his former

(40) *Batmore* & *Graves*, 1 Vent. 260. 1 Burr. 212. Gilb. Ten. 163.

(41) *Fitch* & *Hockley*, 4 Co. 23. a. Kitch. 241. Mo. 465, in *Tiping* & *Bunning*. *Doe* & *Jenney*, 5 East, 531. *Ante*, p. 353-4.

(42) 1 Bac. Abr. 735. Sup. (n. 40).

(43) See the report of *Roe* d. *Noden* v. *Griffiths*, in Sir W. Bl. and 4 Burr. and 1 Watk. on Cop. 288, &c. *ante*, p. 354.

seizin as to so much of his interest as was not parted with by the surrender, or as to the reversion if the whole interest be surrendered, no fine will be due from him on the determination of the particular estate (44).

But the heir or surrenderee of a reversioner or remainder-man, as well as the surrenderee of the particular tenant, must be admitted and pay a fine (45).

If a tenant in tail, who has been admitted, suffers a recovery by plaint in the nature of a writ of entry *ex le post*, merely for the purpose of acquiring the fee simple, the plaint being brought immediately against the tenant in tail, or against the copyholder for life, no further fine would be due on re-admittance under the recovery; but where by plaint a copyhold is recovered upon the accrual of a new title, he that recovereth never having been admitted or paid a fine, there a fine is due on his admission (46).

As a copyholder who surrenders to another on a condition which is performed by the surrenderor, or broken by the surrenderee, remains in of his ori-

(44) *Ante*, p. 353-4. Gilb. Ten. 194.

(45) *Ante*, p. 353. 1 Burr. 213.

(46) Co. Cop. s. 56. Tr. 129, 130-1. Kitch. 241. and see 4 Co. 27. b. in *Taverner* & *Cromwell*. Mr. Watkins was of opinion that if the copyhold were surrendered to a stranger to make him tenant to the plaint, a fine would be due on the admission of such stranger, 1 Vol. on Cop. 305. (n. k.) [2d Ed].

ginal seizin and admission, no fine can accrue on the performance or breach of the condition (47).

JOINT-TENANTS we have seen are but as one tenant to the lord (48), consequently but one fine is due on their admission (49), or on the admission of their surrenderee (50); and when one joint-tenant dies or releases to the others, as no new admittance is necessary, no fine accrues to the lord (51).

It frequently happens that the fine is paid by one joint-tenant only, his admission being the admission of his companions, and when that is the case he may compel the others to a contribution.

COPARCENERS are but as one heir (52), therefore one fine only is due on their admission, when admitted in coparcenary, or on the admittance of their surrenderee (53); and as it would seem that when so admitted, they may release to each other, no fine would be due on the acquisition of any such additional portion.

(47) *Ante*, p. 245, 353. Kitch. 242. Gilb. Ten. 181, 276-7.

(48) *Ante*, p. 354.

(49) But see the author's opinion on the right of the lord to demand more than two years' value on the admission of several persons as joint-tenants, ante, p. 375, &c.

(50) Co. Cop. s. 56. Tr. 130. Kitch. 242. *Attree v. Scutt*, 6 East, 484. S.C. 2 Smith, 449.

(51) *Ante*, (n. 62).

(52) *Ante*, p. 354.

(53) 1 Watk. on Cop. 303. Kitch. 242.

Should the fine be wholly paid by one coparcener, she may compel the others to a contribution as in the case of joint-tenants.

But where coparceners are admitted severally, the fine must be equally apportioned.

And as the heirs of each coparcener must be admitted (54), the lord is of course intitled to a fine on such admission.

When one *joint-tenant* or one *coparcener* surrenders to the others, admittance would seem to be necessary, and a fine would therefore accrue to the lord (55).

TENANTS IN COMMON are to be admitted severally, and must therefore pay several fines, and as there is no survivorship between them, their respective heirs must also be admitted and pay several fines (56); and so must any person to whom they should join in making a surrender: It was expressly so laid down by Lord Ellenborough in *Attree* & *Scutt* (57), contrary to the authority of Lord Coke's Copyholder, s. 56. (and see Kitch. 242.); and to prove that tenants in common convey distinct estates, Lord Ellenborough cited Plowd. 140, "that if two tenants

(54) *Ante*, p. 355.

(55) *Ante*, p. 365. Kitch. 168.

(56) *Ante*, p. 355. And see 4 Co. 28. a. in *Hobart* & *Hammond*.

(57) Sup. in which case it was held that fines and services once multiplied, shall continue due and payable, notwithstanding the re-union of the land in one person. Vide also 1 Watk. on Cop. 304.

in common grant a rent of 20*s.* out of their land, it shall enure as several grants;" and Perkins, sect. 107, "that if two tenants in common of a carve of land lease the same, it shall take effect as several leases."

BARON AND FEME. The husband, it is seen (58), becomes seized of the copyholds of his wife in her right, but need not be admitted, consequently the lord shall not have a fine from him (59).

If the customary *curtesy* or *dower* is of the whole of the copyhold, it would seem that the estate is a continuation of the seizin of the deceased wife or husband, and no admission therefore necessary, and in that case no fine can be due; but, if I am right in supposing that the husband surviving the wife, or the wife surviving the husband, unless there be a special custom to the contrary, must be admitted when the curtesy or dower is of a portion only of the copyholds, (the possession or seizin of the deceased being interrupted by the right of entry in the heir,) then a fine will accrue to the lord (60).

As it does not seem to be necessary that the husband of a feme copyholder for years should

(58) *Ante*, p. 355-6.

(59) By the custom of Yetminster prima in Dorsetshire, the husband shall pay a penny to the steward. App. to Watkins on Cop. No. 11. 2 vol. p. 242. [2d Ed.]

(60) *Ante*, p. 356; and see Kitch. 242.

such adjudication as therein mentioned, vested in the Clerk of the Peace, who was directed to convey the same to such one or more of the creditors, as the justices at any general or quarter session of the peace should order and direct, for the purpose of being sold by such assignee or assignees, for the benefit of all the creditors of the insolvent (67). But by the late act of 1 Geo. 4. c.119(68), the copyhold estates of an insolvent (69), are required to be conveyed by him, in such manner as the court shall direct, so as to *vest* the same in the provisional assignee, who is afterwards to *assign* all the insolvent's estate and effects to the assignee chosen by the court, which assignment, when there are copyholds, is to be entered on the Court Rolls of the manor, and then the assignee is to surrender, or convey, to the purchaser.

It is somewhat difficult to say, under the peculiar wording of the last-mentioned act, what fine or fines would become payable to the lord of the manor on carrying the provisions of the act into effect, with respect to any copyhold property belonging to the insolvent.

But as the act does not create a power in the

(67) This act and the act of 53 Geo. 3, were directed to continue in force until the 1st Nov. 1818, and thenceforth to the end of the then next session of parliament.

(68) See this act in the Appendix.

(69) The words "*real estate*" in the 4th sect. of the act evidently apply to copyholds, as they are expressly mentioned in the 7th sect. directing the provisional assignee to assign the estates *vested* in him, to the assignee chosen by the court.

commissioners of the Insolvent Debtor's Court, to convey copyholds by any common law form of assurance, analogous to the power given to commissioners of bankrupt by the statute of 13 Eliz. c. 7; and as I apprehend that the insolvent could not convey his interest, *so as to vest* his copyhold property in the provisional assignee, otherwise than by a surrender, it would seem to follow, that the provisional assignee is to be admitted under such surrender; and on his admittance the lord would, of course, be entitled to a fine.

It may be contended that the trust estate of the provisional assignee in the copyhold property of the insolvent, would pass to the assignee chosen by the court, under the assignment directed to be made by such provisional assignee, from the inrolment thereof on the Court Rolls of the manor, and that the act operates as a virtual admittance of the assignee; in which case the lord would probably be entitled to a fine, as a consequence of such change of tenancy: I am inclined, however, to think, that no interest was intended to vest in the assignee by the assignment from the provisional assignee, as to any copyhold property belonging to the insolvent; but that it was meant to give the assignee appointed by the court a power, in analogy to the power given to commissioners of bankrupt, to convey such copyholds to a purchaser, either by surrender, or any other form of assurance; and then, as no interest vests

in the assignee, no fine would become payable by him to the lord: In this view of the last mentioned act, the estate which vested in the provisional assignee under the surrender by the insolvent, would pass to the purchaser by the surrender or other conveyance from the assignee chosen by the court, so as to entitle the purchaser to compel the lord to admit him, and upon such admittance he would, necessarily, be subject to a fine.

OCCUPANCY. As there may be a special, though not a general occupant of a copyhold, a fine is due from him; as if there be a limitation to A. *and his heirs*, during certain lives, the lord is compellable to admit the heir of A. according to the tenor of the grant or surrender, and such heir must pay a fine (70).

No fine is due on the release by a rightful tenant to the tenant by wrong, the latter having already been admitted and paid a fine (71).

And as it is not necessary for a disseisee on entry or recovery by plaint to be admitted, no fine will accrue to the lord (72).

(70) Co. Cop. s. 56. Tr. 128. Gilb. Ten. 327.; *ib.* N. 171. *Doe* d. *Lempriere* v. *Martin*, 2 Sir W. Bl. 1148. *Ante*, p. 61-2.

(71) *Ante*, p. 247, 368. Gilb. Ten. n. 69. p. 411.

(72) *Ante*, p. 150. (n. 53). Co. Cop. s. 56. Tr. 129.

As to the necessity of entry by a disseisee previous to his surrendering the copyhold lands, vide ante, p. 150. (n. 53). And see *Clerk* v. *How*, ante, p. 320.

The trustee, and not the *cestui que trust*, is the person to be admitted the lord's tenant (73); therefore no fine can accrue from the *cestui que trust* or his heir or assignee or devisee (74), or from the assignee or devisee of the equity of redemption, when the mortgagee has been admitted (75); but the lord is entitled to a fine on the admittance of the trustee, or mortgagee, or his heir or devisee (76).

It belongs of common right to the lord or steward to assess the fine, but a custom that a copyholder for life in *extremis* may nominate his successor to have the copyhold, paying a reasonable fine to be agreed upon with the lord, or, if that fail, to be assessed *by the homage;* and another custom, that a copyholder for life may nominate one or two that shall have the copyhold lands after his death, for a fine to be assessed *by the homage*, if they cannot agree with the lord, have been adjudged to be good customs (77).

Where a person hath several copyhold tenements by several titles, the lord must assess and

(73) And the trustee may reimburse the fine and fees out of the profits of the estate. Rivet's case, Mo. 890. 1 Watk. on Cop. 293. (n. *.) [2d Ed.]

(74) *Ante*, p. 274, 323. Gilb. Ten. N. 69. p. 410-11. *Trinity College, Cambridge*, v. *Browne*, 1 Vern. 441.

(75) *Ante*, p. 245, 274.

(76) *Rivet's* case, Mo. 890.

(77) *Yelnester Custom's* case, Noy. 2. (cites *Powel* & *Pencock*). *Crab* v. *Biles*, *ib.* 3. cites H. 6. Jac. C. B. 13 Rot. 2613, *Raubus* v. *Mason*. And see 1 Roll. Rep. 48. 1 Freem. 494. pl. 669. *Ford* v. *Hoskins*, Cro. Jac. 368. *Freeman* v. *Phillipps*, 4 Mau. & Sel. 486.

demand his fines severally, and there is no distinction in this respect between a customary heir, and a surrenderee, nor is it material, for this purpose, whether the admissions be contained in one or several copies (78).

It has been said, that the fine may not only be assessed (79), but may be made payable out of the manor; such a custom, however, appears much too unreasonable to be supported: the case of *Yaxley* v. *Rainer* (80), is the only authority for this position, and it is to be observed that the fine there was for a licence to alien, and that the court said, that if it had been for a forfeiture, it might have been otherwise (81).

The sum assessed as the fine, need not be en-

(78) *Dalton* v. *Hamond*, Cro. Eliz. 779. S. C. Mo. 622. S. C. (*Hobart* & *Hammond*,) 4 Co. 28. a. cites *Taverner's* case, ib. 27. a. *Hitch* v. *Wallis*, cited Dougl. 729. Co. Cop. s. 56. Tr. 130. Gilb. Ten. 218. *Searle* & *Marsh*, cited in *Everest* & *Glyn*, 6 Taunt. 428. and see Fisher on Cop. p. 97, 120. *Grant* & *Astle*, Dougl. 722.; but see *Whitfield* v. *Hunt*, *post*.

A surrender by a copyholder to particular uses under which his son should be admitted in tail, would operate as a severance of the estate from any other lands left to descend to such son, or devised to him by his father, so as to entitle the lord and steward to separate fines and fees, *Snagg* & *Fox*, Palm. 342.

(79) 1 Watk. on Cop. 314.

(80) 1 Lord Raym. 44. As to fines on alienation of copyholds, due by particular custom, *vide* also *Holland* v. *Lancaster*, 2 Vent. 134. and note that they were expresaly excepted in the stat. 12 Car. 2. c. 24. for abolishing the incidents of feudal tenure.

(81) See also 1 Watk. on Cop. 317, 318.

tered on the court rolls, but a demand on behalf of the lord, it being a reasonable and legal fine, is sufficient (82).

It is, however, essential, when an entry is made of the amount of the fine on the rolls of the manor, that the sum actually assessed should appear to be a legal and proper fine, without regard to any sum to be remitted by the lord out of favour; for where the entry in the court rolls was, that the lord had assessed a fine of 100*l.* but out of favour remitted 40*l.*, which had reduced the fine to 60*l.*, and the jury finding the annual value of the premises to be 30*l.*, gave a verdict for the plaintiff for 60*l.* being two years' annual value; a rule obtained in the Court of Common Pleas calling on the Plaintiff to shew cause why a non-suit should not be entered, was made absolute, the court being of opinion, that the assessment was an assessment of 100*l.*, and that the latter part of the entry was nothing more than a remission of the payment of part of that assessment, and observing, that much mischief might arise to copyholders, if similar entries were permitted to be made upon the court rolls of manors (83).

If the fine is certain, the tenant should come prepared to pay it, but the lord cannot refuse admittance because the fine is not tendered to

(82) *Lord Northwick* v. *Stanway*, 6 East, 56.

(83) *Lord Northwick* v. *Stanway*, 3 Bos. & Pul. 346.

him even when the fine is certain in amount (84); and when the fine is uncertain the lord must allow a convenient time for the payment of it, and the practice is to fix a day and place for such payment (85).

In some manors it is customary not to take the fine until the succeeding general court, or some fixed period after the admission (86); but, I apprehend, the lord or steward may refuse to accept a surrender from the copyholder, or to admit his surrenderee upon a surrender taken by one or more tenants, or the bailiff of the manor, where a custom of that nature exists, until the fine due on his admission be paid.

Should the fine be unreasonable, or if the copyholder has good cause for thinking it to be so, he may refuse to pay it, and it shall be no cause of forfeiture (87); but it was held, in the case of

(84) *Fish* & *Rogers*, Tr. 4, Jac. B.R. 1 Roll. Abr. 506. (A). 6 Vin. Cop. (A. c.) pl. 1. *Hobart* v. *Hammond*, 4 Co. 28. a, but see S.C. (called *Dalton* v. *Hamond*), Cro. Eliz. 779, Mo. 623. And see Skin. 249.

(85) Gilb. Ten. 219. n. (*o*). *Willowes'* case, 13 Co. 2. Co. Litt. 60. a. N. (1). *Hobart* & *Hammond*, (or *Dalton* & *Hamond*), sup.

(86) A custom not to pay a fine till of full age is a good custom. *Champian* & *Atkinson*, 3 Keb. 90. Lex. Cust. 162. And a custom for the lord to seize till the fine be paid, is good. Cro. Eliz. 351, *in Jackman* & *Hoddesdon*.

(87) See *Dalton* & *Hamond*, (or *Hobart* & *Hammond*), and *Willowes'* case, sup. *Barnes* v. *Corke*, 3 Lev. 309. *Trotter* v. *Blake*, 2 Mod. 229. *Wheeler* v. *Honour*, Sir T. Raym. 42. S.C. 1 Keb. 154. 1 Sid. 58.

Gardiner v. *Norman* (88), that the fine certain due by the custom must, in order to save a forfeiture in law, be tendered at the day appointed by the lord for the payment of the fine assessed, and that a tender made at the time of the assessment is not sufficient, *sed quære?* For although, when the fine is manifestly reasonable, denial of payment will be a cause of forfeiture (89), yet it has been held, that the lord is not justified in entering for a forfeiture, if he has not demanded the fine at the time it was due, or, some time after, of the person of the tenant (90); but the demand may be made by the steward, and that without any express authority in writing (91): And it must be of the specific sum, and not of any larger amount, otherwise the lord cannot recover at law (92).

It is proper, however, for the tenant, when he deems the fine unreasonable, to tender what he conceives to be due.

Whether the fine be reasonable or unreasonable is to be determined by the court in which the action touching the same shall be brought, upon

(88) Cro. Jac. 617. Skin. 250.

(89) Co. Litt. 60. a. N. (1). cites *Parker's* case.

(90) 1 Roll. Rep. 75. Gilb. Ten. 227. *Denny* v. *Lemman*, Hob. 135. *Wheeler* & *Honour*, *ante*, p. 406.

(91) *Trotter* & *Blake*, 2 Mod. 229.

(92) *Titus* & *Perkins*, Skin. 249. But if the lord demand more than he ought, he may make his demand de novo. Ib.

proper evidence to the jury (93); and it is not necessary for the lord to aver that the fine is reasonable, as the unreasonableness of it must be shewn by the copyholder (94).

A single copyholder cannot obtain relief in equity against an unreasonable fine; but in order to avoid a multiplicity of suits, several copyholders may join in a bill in equity, to settle a general fine to be paid by all the copyhold tenants of the manor (95).

The fine on admission is recoverable by the lord or his executors in an action of debt, or on a general *indebitatus* assumpsit (96), and such action

(93) See *Willowes'* case, and *Dalton* v. *Hamond*, (or *Hobart* & *Hammond*), ante, p. 406. *Cowper* v. *Clerk*, 3 P.W. 157. 3 Anst. 663. *Smith* v. *Sallett*, 2 Ch. Rep. 76. *Bell* v. *Wardell*, Willes, 206. ante, (n. 24); but see Cary, 4, 38.

(94) *Denny* v. *Lemman*, Hob. 135. Lex Cust. 161.

(95) *Middleton* v. *Jackson*, *Popham* v. *Lancaster*, *Cowper* v. *Clerk*, ubi sup. *Baker* v. *Rogers*, Sel. Ca. Temp. King, 74. *Vide* also *Mayor of York* v. *Pilkington and others*, 1 Atk. 282. *Brown* v. *Howard*, 1 Eq. Ca. Abr. 163, pl. 4. *Disney et al.* v. *Robertson et al.* Bunb. 41. And see *Meadows* v. *Patherick*, Fin. R. 154.

(96) *Shuttleworth* v. *Garnett*, Carth. 92. S.C. 1 Show. 35. S.C. 3 Mod. 239. S.C. 3 Lev. 261. S.C. Comb. 151. *Bellot* v. *Cartwright*, 1 Lutw. 597. Lex Man. 117. *Wheeler* v. *Honour*, 1 Sid. 58. *Evelyn* v. *Chichester*, 3 Burr. 1717. *Grant* v. *Astle*, 2 Doug. 722. *Whitfield* v. *Hunt*, cited *ib.* 727. n. *Duke of Devonshire* v. *Craddock*, cited *ib.* 728. n. Gilb. Ten. 291. 6 Mod. 129. 1 T.R. 619. Com. Dig. Cop. (H. 6.) And see the pleadings in *Bellot* & *Cartwright*, Lex Man. Appendix, pl. 25.

is not within the statute of limitations (97); but a fine is no charge on the lands (98).

In *Evelyn* v. *Chichester* (99), it was held by the Court of King's Bench, that the executor of the admitting lord might bring assumpsit against a copyholder who was a minor at the time the fine was assessed, but had since attained his full age; and Yates, J. thought that assumpsit would lie if the defendant was still an infant, though perhaps debt would not (100), it is, however, observable, that the infant was admitted in person, without reference to the stat. of 9 Geo. 1. and that he or his guardians (assigned by the court) had been in possession from the time of admission till the commencement of the action, which was two years after he came of age.

But when an infant copyholder, claiming by descent or surrender to will, is admitted under the act of 9 Geo. 1., the lord can only recover the fine by the methods prescribed by that statute (101).

In the case of *North* v. *the Earl and Countess of Strafford* (102), the Court of Chancery allowed

(97) *Hodgson* v. *Harris*, 1 Lev. 273. S.C. 2 Keb. 536. S.C. 2 Saund. 64. S.C. 1 Sid. 415. The lord, in such action, need not identify the lands. *North* v. *Earl & Countess of Strafford*, 3 P.W. 151. Contra in an action for Quit Rents, *ib.*

(98) See *Hitcham* v. *Finch*, 1 Roll. Abr. 374. Chancerie (P.) 1 Watk. on Cop. 321.

(99) 3 Burr. 1717.

(100) See *Borough's* case, 1 Ld. Raym. 36.

(101) *Ante*, pp. 345, 389.

(102) 3 P.W. 151; and see *Bouverie* v. *Prentice*, Belt's Ed. Bro. Ch. Rep. 1 Vol. 200. *post*, title Rents.

a demurrer to a bill in equity, for a fine on admission and arrears of quit rents, on the grounds that the fine, if an admission had taken place, was recoverable by debt or assumpsit, and that if there had been no admittance, the lord had his remedy by proclamations and seizure, and that with respect to the rents the plaintiff might distrain or bring debt for the arrears due to him as executor, and might distrain for the arrears of rent due to him as lord of the manor: But unless there is a demurrer, the court will relieve on the hearing (103).

In terminating the present inquiry, I propose to make an observation on the tenant right of renewal of copyholds for lives.

By the custom of many manors, copyholds are renewable for three lives or any less number, and in some for three lives in possession and three in reversion (104); but in order to establish a tenant right of renewal of copyholds, it must be shewn that the fine is certain, and it is not sufficient to prove a right to renew on payment of a *reasonable* fine, as any uncertainty negatives the allegation

(103) *North* v. *Earl and Countess of Strafford*, sup.; and see *Duke of Leeds* v. *the Corporation of New Radnor*, Belt's Ed. Bro. Ch. Rep. 2 Vol. 338, 518. Equity will entertain a bill for settling a general fine, *ante*, n. (95).

(104) Copyholds are also in some manors granted for a term of years, renewable on payment of a fine certain by any person entitled to the term by the custom of the manor. See *Page's* case, Cro. Jac. 671.

of compulsion (105); nor can the presumption of the duration of the estate from the grant itself be rebutted, except by evidence of constant renewals for fines certain.

In the case of the *Duke of Grafton* v. *Horton* (106), the plaintiff in the cause, who was the heir at law of the last of three lives named in the copy, alleged a custom for the heir of the surviving life to renew on payment of a *reasonable fine*, and afterwards amended his bill by stating, that instead of a reasonable fine, the fine was a year and a half's improved rent if insisted upon, for each life; or lesser sums if the lord thought fit to accept thereof, together with 2*s.* for a heriot; and the defendant, in his answer to the amended bill, insisted that the pretended custom was not sufficiently certain, nor warranted by the rules required by law in cases of customs; and on the hearing of the cause, Lord Chancellor King directed an issue to try the custom at the assizes for the county of Northampton: from this order the duke appealed to the House of Lords, complaining that the respondent had not produced a single instance of such customs from the court rolls of the manor, and that they were contradictory to those under which he derived his title, and that the respondent ought not to be at liberty

(105) *Wharton* v. *King*, 3 Anst. 659.

(106) 2 Bro. Parl. Ca. 284. (2nd ed.) Cop. ca. 3.; and see *Lord Abergavenny* v. *Thomas*, 1 Eq. Ca. Abr. 120. and cited in *Wharton* & *King*, sup.

to insist upon these customs, or any other he should set up as the terms of renewal, when they were not put in issue in the cause, so that the defendant could not be prepared to make a defence thereto upon the trial; and the lords reversed the order of the Court of Chancery, and directed that the respondent should deliver up possession of the premises, and account for the rents to the appellant.

It would also seem, that if there is a visible inconvenience, that one copyholder for life should change the lives by surrendering into the lord's hands, pursuant to a custom, to the use of another for life, that the lord will not be compelled to make admittances thereupon (107).

I shall conclude our present considerations by observing, that when by the custom of the manor the lord may grant copyholds for lives in possession, and also in reversion, the grantee in reversion will be in paramount the title of dower of the wife of the grantor, and of any statute or recognizance executed by him (108).

(107) Gilb. Ten. 256. cites 1 Roll. Abr. 503.

(108) *Cham* v. *Dover*, 1 Leo. 16. 4 Co. 24. a. *Sneyd* v. *Sneyd*, 1 Atk. 442. Lex Cust. 233-4, &c. *Ante*, p. 118.

CHAP. VII.

OF FEALTY, SUIT OF COURT, RENTS, AND OTHER SERVICES;

[Reserving the subject of HERIOTS for a distinct section.]

THE services due from the copyholder to the lord by the established custom of most manors, consist of fealty, suit of court, and small annual payments in nature of quit rents; and in some manors the lord is also entitled to a heriot.

Before copyholds became hereditary, the lord frequently stipulated for base or corporal services, such as reaping or carrying his corn, tiling his houses, or thatching his barns (1), or ploughing his lands a certain number of days in the year, usually denominated *boon* or *due days;* and there are, it is understood, some rare instances of the existence at this day, of services of that nature, at least of the form of the tenants assembling with their teams, ploughs, &c. (2)

FEALTY signifies the oath which was administered to every tenant (3) both freeholder and

(1) Co. Cop. s. 22. Tr. 17.

(2) Kitch. 202. Fisher, 73. 2 Watk. on Cop. 184.

(3) According to Littleton and Coke fealty is incident to every tenure, except tenants in frankalmoigne, and tenants at will, see Co. Litt. s. 91, 132.

copyholder, upon his admittance, to become a faithful tenant to the lord, and to do suit at his courts, &c. (4), and is an imitation of the homage required by every lord, and rigidly enforced during the existence of military tenures (5); and the oath of fealty may be administered either by the lord or his steward (6).

Fealty cannot be done by attorney (7), nor by an infant either personally or by guardian (8); and it is to be performed, as it would seem, by the wife, and not by the husband (9).

Joint-tenants are to do fealty as well as homage, jointly (10), but the fealty of coparceners is, I apprehend, to be done by the eldest sister (11).

And by Lord Coke (12), if there be two co-

Ib. 67. b. n. 2. 68. b. n. 5. Co. Cop. s. 21. Tr. 16, cites *Brudnet & Toxley*, (or *Brudnal & Yoxley*), 5 H. 7; and see Kitch. 260. But in 10 H. 6. the Justices of the Court of Common Pleas held that lessee for years could not do fealty, Co. Cop. s. 21. Tr. 16. marg.; and see Kitch. 260.

(4) Co. Litt. s. 91-2, 93-4. Co. Cop. s. 19, 20, 21. Tr. 14, 15, 16. Kitch. 260.

(5) These tenures were abolished by the stat. 12 Car. 2. c. 24.

(6) Co. Litt. s. 92. Co. Cop. s. 20. Tr. 15.

(7) Co. Litt. s. 93. *ib.* N. (5). *Combes'* case, 9 Co. 76. a. Co. Cop. s. 35. Tr. 80. *Floyer* v. *Hedgingham*, 2 Ch. Rep. 56. 1 Watk. on Cop. 265. *Ante*, p. 349. But in France and other countries fealty may be done by attorney. See N. 5. to Co. Litt. 68. a.

(8) 2 Inst. 11. Co. Litt. 65. b. & n. 4. *ib.*

(9) 1 Watk. on Cop. 265.; but see Co. Litt. 66. a. & b.

(10) Co. Litt. 67. b.

(11) *Ib.* 67. a. 164. b.

(12) *Ib.* 67. b.

parceners or joint-tenants of a seigniory, if the tenant doth homage and fealty to one of them, he shall be excused against the other.

When a tenant cannot attend personally, and is therefore admitted by attorney, or when the tenant is an infant or a remainder-man, his fealty is respited until he can appear and is competent to take the oath, and this sometimes on payment of a small customary fee.

And as the allegiance or homage which was formerly deemed so essential on the admittance of a new tenant, ceased with the abolition of military tenures, so the introduction of an oath of fealty in imitation of it appears to have been both useless and indiscreet: useless, as the lord has a remedy for the subtraction of suit of court and other services, and for non-payment of rent, and indiscreet, as being calculated to lessen the importance, and weaken the solemnity, which should ever attach to the administration of an oath.

It might be well, therefore, that the fealty should be commuted, in all cases, by a small payment, and be entered as respited (13); and there can be no doubt, that a court of equity would relieve against a forfeiture for refusing to take an oath, so very unnecessary at this day (14).

(13) Co. Litt. 68. b. n. 5.

(14) *Cox* v. *Higford*, 2 Vern. 664. 1 Eq. Ca. Abr. 121. pl. 20. *Cudmore* & *Raven* or *Edmore* & *Craven*, cited *ib.*, and Prec. in Ch. 574. And see 6 Vin. Cop. (D. c.) pl. 9. *Ib.* (E. d.) pl. 7, 8.

SUIT OF COURT. Every copyholder is bound to attend the lord's courts, and to perform the duties of a homager, and these courts, it has been said, may be held as frequently as the lord pleases, where the custom has not established any fixed periods: this would appear, indeed, to be a natural consequence of the lord's being compellable to hold a court, whenever the business of the tenants calls for it (15).

If the copyholder is resident within the manor, and neither appears nor essoigns, (that is, justifies his non-attendance from illness or other such cause,) after a general notice in writing affixed to the church door, or otherwise publickly proclaimed, he may be amerced (16); but I apprehend that the amercement must be affeered by at least two of the other copyholders, in analogy to the rule in freehold cases (17); and if he should not attend, or is not duly essoigned on a personal summons, it will be a cause of forfeiture of his copyhold (18).

(15) Co. Cop. s. 31. Tr. 50. Sup. s. 3. Tr. 149. 2 Watk. on Cop. 19. *Ante*, p. 8. But the lord could not harass his tenants by holding frequent courts, unnecessarily.

(16) *Belfield* v. *Adams*, 3 Bulst. 80, 81. S.C. (*Southcot* & *Adams*) 1 Roll. Rep. 256. *Sir John Braunche's* case, 1 Leo. 104.

(17) *Baldwin* v. *Tudge*, 2 Wils. 20. *Chetwode* v. *Crew*, (n. 2.) Willes, 619.

(18) *Taverner* v. *Cromwell*, Cro. Eliz. 353. *Sir John Braunche's* case, *Belfield* & *Adams*, (or *Southcot* & *Adams*) sup. post, tit. 'Forfeiture.'

Copyholders may be essoigned, but cannot do suit by another (19), as they are not within the statute of Merton, 20 H. 3. c. 10. which enables freeholders to do suit by attorney (20).

The lord may distrain his copyhold tenant for non-performance of suit (21), but the distress is considered as a pledge to compel the performance of the services, and cannot be sold (22).

It would seem, however, that the lord cannot distrain for the amercement, either in a court baron or a customary court, as of common right, but is put to his action of debt (23); and the reason is, that he may distrain for the service itself, and therefore ought not to have a double distress (24).

(19) *Sir John Braunche's* case, 1 Leo. 104. 4 East, 280. And see Kitch. 145. who says that "by assent of the lord a copyholder may compound to pay a certainty yearly to release his suit."

(20) *Ante*, p. 102. It should seem that a freeholder cannot make an attorney to do suit for him, by parol. Kitch. 145.

(21) Co. Litt. s. 225-6-7. Gilb. Dis. 5. 2 Vol. Watk. on Cop. 177. 2 Inst. 118. *Rivet* v. *Dowe*, Noy, 135. S.C. 2 Brownl. 279.; and see *Crawley* v. *Kingsmill*, Noy, 24. But as to freehold tenants, see stat. *Marlebridge*, 52 H. 3. c. 9. In the above case of *Crawley* & *Kingsmill*, it was held, that if the lord demand the fealty of his tenant, who refuses and dies, the lord may distrain for it after the tenant's death.

(22) *Gomersall* v. *Medgate*, Yelv. 194. *Gomersale* v. *Wayts*, Cro. Jac. 255. *Hewet* v. *Norberow*, 1 Bulst. 52. Gilb. Dis. 13. Greenw. of Co. Courts, 281. And the distress must not be excessive, 3 Bl. Com. 12.

(23) *Rowlston* v. *Alman*, Cro. Eliz. 748.

(24) Gilb. Dis. 11, 16. *Allen* v. *Givers*, Mo. 185. Lex Man. 22. pl. 4.

But as it appears that the lord may prescribe in a distress for the amercement in a court baron (25); so by special custom, I apprehend, an amercement in a customary court may be distrained for.

In the case of *Thorne* & *Tyler* (26), the defendant justified the distress under a custom, that if a copyholder suffered his house to be out of repair, and the same be presented in court by the homage, the tenant should be amerced, and that the lord might distrain the cattle of the tenant, or any undertenant of the copyhold lands, *levant* and *couchant* thereon, for the amercement, and it was held to be a good custom.

The suit which the tenant thus engages to perform, may be done by a feme sole or a widow in a customary court, but a woman is not allowed to sit on the homage *to try issues* in a court baron, where the suitors are the judges (27); nor can a widow sit on the homage in a court baron even to present, unless the husband died without an heir (28).

But the husband, and not the wife, is to perform the services to the lord (29), with the exception, perhaps, of fealty (30).

(25) Gilb. Dis. 16. *Richard Godfrey's* case, 11 Co. 45. a. *Pell* v. *Towers*, Noy, 20. *Doctor & Student*, 47.

(26) Mar. 161-4.

(27) *Ante*, p. 92-3. So, I apprehend, a woman cannot sit on the homage in a trial in the customary court by plaint, in the nature of a real action.

(28) F.N.B. 159. 2 Watk. on Cop. 69, 70.

(29) *Hed* v. *Chalener*, Cro. Eliz. 149.

(30) *Ante*, p. 414.

And as suit of court cannot be done by attorney, an infant appears to be excused from any services during the period he is in ward, at least until the age of 14, when he is considered of years of discretion (31).

Joint-tenants and coparceners, (but the latter only when admitted in coparcenary,) are as one tenant to the lord, and shall therefore do but one suit (32), but tenants in common take several estates, and must severally do suit (33); and as copyholders are not within the statute of Marlborough (34), it does not seem that they can compel contribution of suit.

RENTS OF ASSIZE. This is the ancient term for the small reservation on the original grant of freehold and copyhold lands (35), and which was sometimes made in money, and at others in corn or the like, but these payments are now more usually denominated quit rents; and those paid by freeholders, are frequently termed chief rents: it is essential to the title to these rents that they

(31) 2 Watk. on Cop. 175. *Post*, title, Guardianship. An attorney cannot be amerced for not doing suit to his lord's court, at such time as his attendance is required at Westminster. *Stone's* case, 1 Vent. 16, 29.

(32) The suit by coparceners is, I apprehend, to be performed by the eldest sister, as in the case of freeholds. Kiteh. 108. *Ante*, p. 414.

(33) *Bruerton's* case, 6 Co. 1 & 2.

(34) 52 Hen. 3. c. 9. *ante*, p. 103: and see *Bruerton's* case, sup. F. N. B. 162. 2 Inst. c. 9.

(35) 2 Inst. 119.

should have been paid immemorially and without any variation, so that, as in many instances both with respect to freehold and copyhold lands, where no rent has been paid within time of memory, or where there has been a variation in the payment, the rent originally reserved is lost (36).

The lord may distrain for rents of assize of common right (37), and now by the 4 Geo. 2. c. 28. s. 5. all persons have the like remedy by distress for rents of assize, chief rents, and rents seck (38), as in case of rents reserved upon lease, and the statute we have seen extends to copyhold lands (39).

This distress may be upon the lands in the hands of a lessee (40), yet it is supposed that they are not chargeable in the hands of a new tenant, for any arrears (41); but then the arrears would be recoverable in an action of debt.

The lord may avow for the rent of a copyholder

(36) A rent service is not extinguished by purchase of part of the tenancy, but shall be apportioned. Yet it is otherwise when the service is entire, and not annual, as in the case of heriot service, Co. Litt. 149. a. & b.

Whether a rent can be apportioned on a re-grant of copyholds, see ante, p. 110, 111.

(37) Co. Litt. s. 213. *Ib.* 150. b. Gilb. Dis. 5.

(38) This is usually described as a dry rent reserved by deed, without clause of distress, Gilb. Dis. 6.

(39) *Ante*, p. 101. Gilb. Dis. 6. Gilb. Ten. N. 150. 2 Watk. on Cop. 181-2.

(40) *Rivet* v. *Dowe*, Noy, 135. S. C, 2 Brownl. 279.

(41) *Hitcham* v. *Finch. et al.* 1 D'Anv. 753. (P.) pl. 1. 1 Roll. Abr. 374-5. Chancerie, (P.) pl. 1. *Ib.* (Q.) pl. 3. 2 Watk. on Cop. 180.

in the courts of law (42), but it seems doubtful whether debt will lie unless the lord has conveyed away the manor, and so lost the remedy by distress (43); and in case of wilful and absolute refusal to pay rent, the lord may seize as for a forfeiture (44).

Copyholds not being within the statute of 32 H. 8. c. 37., the arrears of rent for copyhold tenements cannot be recovered by executors and others, under the provisions of that act (45).

But I apprehend that debt will lie by executors or administrators for such arrears (46).

It has been said, that the lord has no remedy in equity after he parts with the manor, for rents due before his alienation (47); and this I conceive is perfectly consistent with the rules of equity, as it would seem that the lord could recover the arrears in an action of debt (48).

But when, from the uncertainty of the nature of the rents, or of the lands out of which they are payable, or otherwise, the lord is deprived of his remedy at law, a court of equity will relieve

(42) *Laughter* v. *Humphrey*, Cro. Eliz. 524. Skin. 9. Gilb. Ten. 308.

(43) N. (1) Co. Litt. 57. b. *Hitcham* & *Finch, ante*, (n. 41). 2 Watk. on Cop. 181-3. Gilb. Ten. 308.

(44) *Post.* tit. Forfeiture.

(45) *Ante*, p. 105. Woodfall's Landl. & Ten. 288.

(46) Co. Litt. 47. b. 162. b. *Ognels'* case, 4 Co. 49. b. *Shuttleworth* v. *Garnett, ante*, p. 408. (n. 96.)

(47) *Hitcham* v. *Finch et al.* sup. 2 Watk. on Cop. 181.

(48) N. 1. Co. Litt. 57. b. 2 Watk. on Cop. 181 (n. e), 183. 6 Vin. Cop. (N. d.) pl. 3. marg.

him (49); if, however, he has a legal remedy, he must pursue it (50). So a bill for suit of court to a manor, and for a fee farm rent or law day silver at a Court Leet, was dismissed, the remedy being at law (51).

RELIEFS. Before we enter upon the subject of *heriots*, it may not be deemed irrelevant to notice that reliefs are paid by freeholders only (52), and are divided into two sorts,—the one by service, the other by custom: the former is paid on death, and the latter on death or alienation, according to the custom (53).

The remedy for the *proper* relief is by dis-

(49) *Holder* v. *Chambury*, 3 P.W. 256. *Duke of Leeds* v. *Powell*, 1 Ves. 171. *Thorndike* v. *Allington*, 1 Ch. Ca. 79. *Collet* v. *Jaques*, *ib.* 120. *Eton College* v. *Beauchamp and Riggs*, *ib.* 121. *Davy* v. *Davy*, *ib.* 144. *Benson* v. *Baldwyn*, 1 Atk. 598. *Cox* v. *Foley*, 1 Vern. 359. *Duke of Bridgewater* v. *Edwards*, 6 Bro. Par. Ca. 368: and see 2 Vern. 382-6.

(50) *Bouverie* v. *Prentice*, 1 Bro. Ch. Rep. 200. *Duke of Leeds* v. *the Corporation of New Radnor*, 2 *ib.* 338, 518. *Ante*, p. 410.

(51) *Thornhagh* v. *Hartshorn*. Bunb. 237.

(52) Gilb. Ten. 330. Co. Cop. s. 25. Tr. 34.; and see Wright's Ten: 97. Gilb. Dis. 7. Kitch. 286. But it would seem that by special custom a relief may be payable by a copyholder, Kitch. 202. *Hungerford* v. *Havyland*, 2 Roll. Rep. 370. S. C. W. Jones, 182. S. C. 3 Bulst. 323. Lat. 37, 95, 130. Com. Dig. Cop. (K. 11). 2 Bl. Com. 97. Watk. Gilb. Ten. n. 173.

(53) Co. Cop. s. 25. Tr. 27-8.

tress (54), and an action of debt, it has been said, does not lie, except by executors or administrators (55), who shall have debt but cannot distrain (56): yet it should seem that the lord himself may bring debt for relief (57); and for an *improper* or *prescriptive* relief, the lord shall not distrain, unless he can likewise prescribe in the distress (58).

OF HERIOTS.

THE heriot is a badge of the feudal system (59), and may, at the present day, be deemed the most, if not the only, obnoxious part of copyhold tenure, but the existence of this service is very limited, and it attaches partially on freehold as well as copyhold estates.

As it was originally a tribute to the lord of the horse or habiliments of the deceased tenant, in order that the *militiæ apparatus* might continue to be used for the purposes of national defence by

(54) Co. Cop. s. 31. Tr. 45. Gilb. Dis. 7. *Ognel's* case, 4 Co. 47. b. 1 Roll. Abr. 665. (E.) pl. 4. Scroggs, 102. Hungerford and Havyland, *ante*, (n. 52).

(55) Co. Litt. 83. b.

(56) Co. Litt. 47. b., 83. b. 32 H. 8. 20. 19. H. 6. Kitch. 86. *Shuttleworth* v. *Garnett*, 1 Sho. 36. S. C. Carth. 91. *Ognel's* case, sup. Dy. 24. a. pl. 149.

(57) Co. Cop. s. 31. Tr. 45. *Hungerford* & *Havyland*, sup. *Lord North's* case, 2 Leo. 179. Kitch. 86.

(58) Gilb. Dis. 8. See further as to reliefs, post. 2 vol. tit. 'COURT BARON, (*Suit of Court.*)'

(59) For the derivation of this service, see Co. Litt. 185. b. Co. Cop. s. 24. 2 Bl. Com. 97, 423-4. Nels. Lex, Man. 113.

each succeeding tenant, it was natural that on the decline of military tenure the heriot should be commuted, and accordingly we find that, in some manors, it is customary to render to the lord the best animal of which the tenant dies possessed, and in others the second best beast, and again in others the only beast, if but one, or, if the tenant has no beast, then to pay a fixed sum in lieu of heriot (60); and in others to render the best beast or good, *or* to pay a sum certain at the election of the lord; and again, in other manors, the lord is intitled to the best beast, if the tenant die possessed of a beast, otherwise the best dead good or a sum certain.

According to some writers, the heriot of the best beast is not, in all cases, a commutation or substitution for the military heriot, but was originally rendered by the villein or husbandman for the purposes of agriculture, in analogy to the warlike heriot on the death of a military tenant; and this by the indulgence of the lord, who was the absolute owner of all the goods and chattels of the pure villein (61).

HERIOT SERVICE. The heriot service being a reservation by the lord upon his feudal donation, and arising from the tenure between the lord and tenant, is in the nature of a rent which lies in *render*, and the remedy was therefore originally by distress (62).

(60) *Griffin* v. *Blandford*, Cowp. 62.

(61) 2 Bl. Com. 97, 423.

2 Watk. on Cop. 128.

(62) Kitch. 262-3. 3 Bl. Com. 15. Bro. Abr. tit. Har-

And this distress may be of any goods on the land, although the property of a stranger (63).

It was formerly doubted whether the lord might seize the heriot service (64), it would, however, seem to be established, that when the tenure is by the best beast, the service lies in *prender*, as well as *render*, and that the lord may seize as in the case of heriot custom (65), because the choice of the best beast is in the lord, and not in the tenant, and that choice is to be determined by seizure;

iots, pl. 2, 6, 7. 2 Watk. on Cop. 167-8.

(63) *Major* v. *Brandwood*, Cro. Car. 260. S. C. W. Jones, 300. Bro. tit. Hariots, pl. 6. *Osborn* v. *Steward* or *Sture*, 3 Mod. 231. S. C. 2 Lutw. 1366. S. C. 3 Salk. 181. Lex. Man. 120; but see Owen, 146, in *Goosey* v. *Pot*.

A distress for heriot service is within the statutes 7 Hen. 8. c. 4. 21 Hen. 8. c. 19. and 11 Geo. 2. c. 19. as to costs: it is also, I conceive, within the stat. 8 Ann. c. 14. as to distress after the expiration of the lessee's term. *Haselip* v. *Chaplen*, Cro. Eliz. 257-8, 329. *Mackworth* v. *Shipward*, Cro. Jac. 28. *Loyd* v. *Winton*, 2 Wils. 28. S. C. Barnes, C. P. 148. 2 Watk. on Cop. 168. but an avowry for such distress is not within the statute of limitation, 32 H. 8. c. 2. *Vide* 2 Inst. 95-6. *Bevil's* case, 4 Co. 8.

(64) 8 H. 7. f. 10. Bro. tit. Hariots, pl. 7. Kitch. 263. Keilw. 82. Doct. & Stud. 76. *Gresham* v. *Gainsford*, Bendl. 18. *Wilson* v. *Wise* or *Vyse*, *Ib.* 39. a. pl. 154. S. C. Mo. 16. 2 Nels. Abr. 931. pl. 1. But see Co. Cop. s. 31. Tr. 44. *Woodland* v. *Mantel*, Plow. 95-6. 16 H. 7. f. 5. Fitz. tit. Hariott, 2. Bro. tit. Hariots, 2. *Odiam* v. *Smith*, Cro. Eliz. 589. S. C. 1 And. 298-9. S. C. Mo. 540. *Parker* v. *Gage*, 1 Show. 81. *Edwards and another* v. *Moseley and another*, Willes, 192. Gilb. Dis. 9.

(65) Kitch. 263, *Ib.* 266. cites 27 Ass. 24. 8 H. 7. f. 10. Bro. tit. Hariots, 6, 11. *Sir John Peter* v. *Knoll*, Cro. Eliz. 32. 3 Bulst. 325.

but that if the tenure is by the rent of a hen or capon, or the like, the lord's remedy is by distress only (66); it is also settled that the seizure for heriot service may be either within or out of the manor (67).

In avowing for heriot service, the exact nature of the heriot, whether the best beast or other thing, must be set forth (68); but where in replevin the defendant made conuzance as bailiff to the lord, it was adjudged on demurrer, that it was not necessary to set forth the nature of the heriot, or the value thereof, for that might not be known to the defendant (69).

When the original grant is lost, the lord must prescribe, which prescription necessarily presumes a grant in fee simple (70).

The heriot service being due by reservation, shall go with the reversion to the heir or grantee, and shall follow the seigniory if the grant is in

(66) Gilb. Dis. 10, 11. *Woodland* v. *Mantel*, Plow. 96. As to the right of the lord to distrain when the heriot is of the best beast, or a sum certain at his election, see *Bear* v. *Hodges*, Litt. Rep. 33.

(67) Kitch. 263-5. 2 Inst. 132. 3 Bl. Com. 15. Dr. & Stud. 128. *Woodland* v. *Mantel*, sup. *Parker* v. *Gage*, 1 Sho. 81. *Austin* v. *Bennet*, 1 Salk. 356. See 3 *ib.* 333. But see contra Keilw. 82. a. 84. b.

(68) *Shaw* v. *Taylor*, Hob. 176. S. C. Hut. 4, 5. And see *Parker* & *Radcliff*, 1 Bos. & Pul. 282, 393.

(69) *Major* v. *Brandwood*, Cro. Car. 260, cites *Dicker* v. *Higgins*, Tr. 18 Eliz. Rot. 506. Anon. Tr. 13 Jac. Rot. 1148. Lex Man. 117, 118. See further as to Avowry for heriot, Statham. tit. Avowrie. Kitch. 266.

(70) Kitch. 262-3-7. 3 Salk. 332. 2 Watk. on Cop. 134-5.

fee; but where there is no reversion (71), or where the term has not commenced, as upon the death of a grantee in a reversionary lease during the continuance of the first lease, and having therefore only an *interesse termini*, no heriot is due (72).

It is said to be due on the death of a tenant in fee simple only, but it clearly may be reserved on a lease for life, or on the death of every particular tenant whether for life or years (73), or even at will (74).

Some of the books treat of heriots by reservation on deeds, as distinguishable from heriot service, the latter being a heriot arising from tenure, and the former not so; but I must confess myself at a loss to discover any *such* distinction between them; and if on a grant at this day of freehold lands, a sum should be reserved in the name of an heriot, to which there can be no objection I conceive (75), it would surely be a heriot arising

(71) See *Osborn* v. *Steward* or *Sture*, ante, (n. 63), and the Pleadings in S. C. Lex Man. Appendix, pl. 26.

(72) *Lion* v. *Carew*, 1 Vent. 91. S.C. (*Lanyon* v. *Carne*,) 2 Saund. 165. S.C. (*Langan* v. *Carne*,) 1 Lev. 294. S.C. (*Lemal* v. *Cara*,) 2 Keb. 505, 572, 588, 677. S.C. (*Hangon* & *Carve*,) Sid. 487. Lex Cust, 242-3. Lex Man. 119, 120. *Bishop of Gloucester* v. *Wood*, Wyn. 46, 57. 2 Watk. on Cop. 133-4.

(73) Kitch. 262-3. Keilw. 84. a. & b. 3 Salk. 338. *Lion* v. *Carew*, *Osborn* v. *Steward* or *Sture*, sup. *Ingram* v. *Tothill*, 1 Mod. 216. S.C. 2 Mod. 93, 281. S.C. 1 Vent. 314. 2 Lev. 210. 3 Keb. 785. Lex Man. 118, 119.

(74) 2 Bulst. 196 in *Hix* v. *Gardiner*. 2 Watk. on Cop. 146.

(75) *Lion* v. *Carew*, *Osborn* v. *Steward* or *Sture*, sup.

This has frequently been called *Suit Heriot*.

from tenure, and properly denominated heriot service, although it should certainly seem that there is a distinction in the remedy for heriots payable by freeholders to lords of manors, under ancient grants, and denominated heriot service, as contra-distinguished from heriot custom, and for heriota reserved by deed at this day; which latter cannot be demanded, after the estate of the grantee is determined, any more than rent, of which nature it partakes; but heriots which arise from *ancient* tenure, as well as heriots by custom, may be seised after they become due (76): And a reservation of a heriot by deed is to be construed strictly, and therefore is not payable by an assignee, if it is not so particularly expressed in the grant (77).

All entire services, such, for instance, as to render an entire chattel upon the death of a tenant, shall be multiplied by alienation of any part of the tenancy (78): But Mr. Watkins was of opinion (79), that the heriot service could not be multiplied in prejudice of the donee or grantee in fee, unless he parted with his whole estate, as the

(76) *Ingram* v. *Tothill*, *Osborn* v. *Steward* or *Sture*, ante, p. 427. Keilw. 84. b. and see 2 Nels. Abr. 931-2.

(77) *Scory* v. *Randall*, Cro. Car. 313. S. C. Het. 57. *Ingram* & *Tothill*, sup. It has been said that *suit heriot* cannot be taken off the manor, 1 Sho. 81, which assumes that it does not lie *en prender:* And this seems to be the law. See *Edwards* & *Moseley*, Willes 192. sed. vide 2 Watk. 163-4.

(78) Co. Litt. s. 222-3. *Bruerton's* case, 6. Co. 1. *Talbot's* case, 8 Co. 105. 1 Keb. 357. in *Baker* v. *Berisford*.

(79) See 2 Vol. of his Treatise on Cop. 135-6.; and see Co. Litt. s. 19, 215. Perk. s. 637.

person to whom he should grant an estate for life, or years, or in tail, would hold of him and not of the lord; but that on a grant by the tenant in fee to A. for life or in tail, with remainder over in fee, there a heriot would be due on the death of A. as he would hold of the lord (80); and this, as the whole fee passes by the grant, is perfectly reconcilable with settled principles, for when particular estates are created by the tenant in fee, and the whole fee is not parted with, he himself remains the lord's tenant, and a heriot would be due on his death (81).

But Mr. Watkins in another part [p. 149, 150.] observes, that if a person seised in fee of freehold lands, grant to A. for life, with remainder to B. for life, with remainder to C. for life, with remainder to D. in fee; A. B. C. and D. shall hold of the lord, as the whole fee is disposed of: but that as the particular interest granted to A. and the several remainders limited to B. C. and D. form together but one estate, (Co. Litt. 143. a.), it should seem to follow that A. B. C. and D. form but one tenant to the lord, and consequently that but one heriot can be due, and *that* on the decease of the survivor of them (82). It, however, appears to me that, in such a case, A. B. C. and D. could not be considered as one tenant,

(80) 2 Vol. Watk. on Cop. 136. Bro. Tenures, 21. Dy. 362. b. pl. 19. 2 Inst. 505. Co. Litt. 21. b. *Webbe & Potter*, Godb. 18. See S. C. Owen, 26.

(81) 2 Vol. Watk. on Cop. 135.

(82) Cites Keilw. 83. b. 94. a. pl. 7 & 8, and adds Quære de hoc?

but that each of them holding of the lord paramount, and not of the grantor, a heriot would be due on the death of each (83).

Again, Mr. Watkins distinguishes between persons taking by *the act of law*, as the husband in respect of his curtesy and the wife of her dower, and by *the act of the party*, as the grantee for life or years or in tail, the heriot being due in the former case, but not in the latter, as it can only be claimed on the death of the person who is tenant to the lord (84): and as the widow, except she takes the whole estate, is tenant to the heir (85), no heriot, he observes, would be due on her death; but the above distinctions are inapplicable to copyholds, not only as being confined to heriot service, but also because the copyholder in every case holds immediately of the lord (86).

HERIOT CUSTOM. With the exception of heriot service, of which I have briefly spoken, the only heriot recognized by our laws since feuds became hereditary, and since copyholders ceased

(83) Yet see Kitch. 262-3, who says, that to have a heriot after the death of tenant for life or years, is heriot custom, and that heriot service is after the death of tenant in fee, cites 14 H. 4. f. 5. 8 H. 7. f. 11. 21 H. 7. f. 13. & 16. So (he adds), a heriot upon every surrender, or every alienation, is heriot custom, cites 3 H. 6. Tit. 8. B. And see Kitch. 265-6. Bro. tit. Hariots 5. Lex Cust, 238.

(84) 2 Vol. Watk. on Cop. 136-7-8. (but see Keilw. 84. b. 14 Vin. 296.)

(85) 2 Vol. Watk. 137. cites Bro. Ten. 84. Watk. on Desc. 88.

(86) See further as to heriot service, *post.* tit. Heriot Custom.

to be mere tenants at will, is that which is usually denominated heriot custom, and which is due by virtue of an *immemorial* usage from every tenant of the particular manor (87), more frequently on death (88), but sometimes on alienation also, or on alienation only (89).

This species of heriot is due in respect of copyhold as well as freehold lands, and is said to lie in *prender* only, and not in *render*, therefore the lord cannot distrain for it (90); heriot custom may also be due on the death or alienation of a copyholder for life or years, as well as of a tenant in fee simple; and although in freehold cases, when particular estates are carved out by a person seized in fee, and the whole fee disposed of, it has been doubted whether more than one heriot is due, (particularly if it be heriot service,) and *that* on the death of the survivor of the particular tenants and remainder-man (91); yet in copyhold cases, as each particular tenant holds immediately of the lord, a heriot must be due on the

(87) A composition made within time of memory would not be binding, Co. Cop. s. 31. Tr. 46. 2 Bl. Com. 424.

(88) A Custom that the lord should have the best beast of every person dying within his manor, would be void as to strangers, *Parker* & *Cambleford*, Cro. Eliz. 725.

(89) Kitch. 265. Hil. 8 Hen. 8. fol. 10. a. & b. pl. 3. Bro. tit. Hariots 8. 2 Watk. on Cop. 133. "*on the in-coming of a purchaser*," *Parkin* v. *Radcliffe*, 1 Bos. & Pul. 282, 286.

(90) Kitch. 263, 266-7. 38 Ed. 3. fol. 7. 37 B. of Ass. 24. 8 Hen. 7. f. 10. 13 E. 3 Bro. tit. Hariots, 2, 6, 7, 9. Gilb. Dis. 10. 3 Bl. Com. 15.

(91) *Ante*, p. 429, 430. (n. 82, 83.)

death of such tenant, whether or not the whole fee is disposed of by the surrender or will under which he derives his title.

Mr. Watkins in treating of heriots due on *alienation*, makes the same distinction between the creation of a particular interest, and the disposition of the whole fee simple, as in the case of heriot service (92), and therefore assumes that the heriot would not be due on the grant of a less estate than a fee simple, such grant not being a change of tenancy with respect to the lord: this is quite clear, I conceive, but it is irrelevant to copyhold tenure for the reason just assigned, namely, that the copyholder in every case holds immediately of the lord, so that a surrender of any portion of his interest must of necessity create a change of tenancy.

An heriot is due on the death of the reversioner, both as to freehold and copyhold estates (93).

And by custom an heriot may be claimed on the death of the head of a body politic (94).

But it is due on the decease of the lord's tenant, and therefore on the death of the trustee, and not of the *cestui que trust* (95).

(92) 2 Watk. on Cop. 156-7. ante, p. 428-9.

(93) *Butler* v. *Archer*, Owen, 152. Br. Hariots, 1. Br. Avowrie, 142. Br. Entre Cong. pl. 20. 2 Watk. on Cop. 149. *Ante*, p. 150.

(94) 5 Ed. 4. 72. b. *Long's* case, Fitz. Har. 7. 2 Watk. on Cop. 155. cites also 1 E. 2. 14. a. Fisher, 81. cites *Long's* case, and two instances in Oxford University. But not without a custom for it. Fitz. Har. 7. And see Kitch. 264.

(95) *Trin. Coll. Camb.* v. *Browne*, 1 Vern. 441. 1 Sir

It would seem that the heriot, in case of disseisin, will be due on the death of the disseisee, and not of the disseisor, as the former continues tenant to the lord by right, unless indeed the entry of the disseisee or his heir be tolled (96); but it is to be recollected that a copyholder cannot, properly speaking, be disseised (97), and that the entry of him who has the customary right, is not tolled by descent (98).

In copyhold cases an heriot will be due on the death of the surrenderor, if he die before the admission of the surrenderee, the latter not becoming the lord's tenant until admittance (99).

As joint-tenants make together but one tenant to the lord, and a heriot being payable only on the death of a person who dies *solely* seized, no heriot is due until the death of the survivor of them (100).

W. Bl. 141. *Smartle* v. *Penhallow*, 2 Lord Raym. 1000. S. C. 1 Salk. 189. S. C. 6 Mod. 67. 3 Atk. 77, in *Car* v. *Ellison*.

(96) Kitch. 263-4. 44 Ed. 3. fol. 13. 7 H. 4. fol. 17. Bro. tit. Hariots, 1. *Norrice* v. *Norrice*, Mar. 23. 2 Roll. Abr. Heriott 2. 2 Watk. on Cop. 146-7. Gilb. Ten. n. 23-4.

(97) *Ante*, p.p. 89, 150, 402.; but see 2 Roll. Abr. Her. 2.

(98) *Ante*, p. 59.

(99) Kitch. 265. Mr. Watkins makes a qu. whether if the surrenderee die, and his heir be admitted (which admission would relate back to the date of the surrender), the lord could claim a heriot on the death of the surrenderee; and adds "If so the lord must return the heriot taken on the death of the surrenderor."

(100) *Butler* v. *Archer*, Owen, 152. Bro. tit. Hariots, 4. Prescrip. 29. 24 E. 3. 72. 25 E. 3, 7. 19 R. 2. Tit. 5. Fitz. Har. 3, 5. Kitch. 264. 2 Watk. on Cop. 147-8. *Ramshaw* & *Ro-*

And it should seem that the law is the same as to parceners, *when admitted in coparcenary*, as they also are but as one tenant to the lord, and are seized *per mie et per tout* (101): And when they are so admitted, I apprehend that no heriot will be due in respect of any share of the property, so long as the privity of estate continues between surviving coparceners and the heir or heirs of one or more deceased coparcener (102); but should coparceners take admission separately, then I conceive they would stand on the same footing as tenants in common.

And as tenants in common are *solely* seized, an heriot is due on the death of each (103).

As a feme covert can have no ownership in personal chattels, it would seem that the lord shall not have a heriot on her death (104); but it is observed by Mr. Watkins [2 vol. on Cop. 151], that this reasoning will not hold where she has a separate estate.

When a feme copyholder marries, the husband and wife are seized in her right, and the seizin continues in the wife, if she survive the husband; and as there is no change of tenancy on the death of the husband, no heriot will accrue to the lord (105).

bottom, Duke's Char. Us. by Bridg. 135.

(101) 3 Leo. 13. ca. 30. 2 Watk. on Cop. 148-9. *Ante*, pp. 354, 395.

(102) Co. Litt. 163. b. 164. a.

(103) *Ante*, p. 355, 396. *Attree* v. *Scutt*, 6 East, 481. et seq. S.C. 2 Smith, 449.

(104) 2 Bl. Com. 424. cites Keilw. 84. b. 4 Leo. 239. pl 377.

(105) Co. Litt. 351. a. 185. b.

An heriot is due in copyhold cases on the death of the husband, tenant by the curtesy, and of the wife, tenant in dower, whether the curtesy or dower is of the whole or a portion only of the estate, as they respectively hold immediately of the lord in both instances (106).

But in freehold cases, as the heir, and not the widow, is the tenant to the lord, it would seem that an heriot is not due on her death (107).

When this service is only due on death, the lord is not entitled to an heriot on the death of an assignee of a bankrupt tenant for his own life and the lives of others, though he is bound to admit the assignee, but he shall have his heriot on the death of the bankrupt (108).

An heriot is due in respect of the land, so that when a person dies seized of several heriotable tenements, an heriot must be paid for each (109), though by the custom of some manors one heriot only will be due (110).

1 Dougl. 329. Plowd. 191. a. 2 Inst. 301.

(106) *Ante*, p. 357-8. Gilb. Ten. 172-3. *Chapman* v. *Sharpe*, 2 Show. 194.

(107) *Ante*, p. 430. Neither does this reason hold when there is no heir, in such case therefore, perhaps, a heriot would be due, 2 Watk. on Cop. 152. Same on Desc. 83. N. (n).

(108) *Smartle* v. *Penhallow*, 2 Lord Raym. 1002-3. S. C. 1 Salk. 188-9, 3 *Ib.* 181. S. C. 6 Mod. 63.

(109) Kitch. 264. *Brierton's* case, 6 Co. 1. And in such a case it is sufficient to alledge, that a heriot is due on the death of every tenant dying seized. *Siliard's* case, 1 Bulst. 101. 2 Nel. Abr. 931, pl. 7.

(110) This I have understood is the custom of the ma-

When an heriot is due on alienation (111), it would seem capable of being multiplied by the disposition of a portion either of the interest in the land, or of the land itself, and, consequently, the alienor would be liable to an heriot in respect of the reversion in the former case, and of the land he should retain in the latter (112); and after alienation of any part of heriotable lands, separate heriots would be payable, although the lands should again unite in the same person (113).

Both heriot service and heriot custom would, I apprehend, be extinguished in freehold cases by the lands uniting with the manor, either by purchase or escheat, but in copyhold cases it would seem that if the lord re-granted the lands, they would still be liable to heriot custom (114), in analogy to the rule as to fines, &c.

nor of Eardisley Foreign in Herefordshire; and see 2 vol. Watk. on Cop. 155 (n. i.), 278, 298. [Customs of Mayfield and Framfield]. Kitch. 265.

(111) Equity is slow to interpose in favour of such a custom. *Wirty* v. *Pemberton*, 2 Eq. Ca. Abr. 279.

(112) *Bruerton's* case, 6 Co. 1. *Talbot's* case, 8 Co. 105. *Chapman* v. *Pendleton*, 2 Brownl. 293. H. 34 Ed. 3. Fitz. Har. 1. Kitch. 264-6. 2 Vol. Watk. on Cop. 159. *Baker* & *Berisford*, 1 Keb. 357. and see *Attree* & *Scutt*, 6 East. 483. S.C. 2 Smith, 449.

(113) Kitch. 265. *Talbot's* case, sup. Fitz. Har. 1. H. 34 Ed. 3. and see *Attree* & *Scutt*, sup. 2 vol. Watk. on Cop. 160.

(114) 14 H. 4. f. 8. 8 H. 7. f. 11. Kitch. 264. 14 H. 4. 5. Bro. Hariots, 8. *Bruerton's* case, *Talbot's* case, *Chapman* v. *Pen-*

And though purchase of part of the lands would, in a freehold case, extinguish the heriot service as to the whole, yet it would seem to be otherwise as to heriot custom (115).

When the heriot is the best beast or good, the property in such beast or good is in the lord immediately on the death of every tenant (116), or on the alienation (when by the custom a heriot is due on alienation), and the lord will be bound by his election, although he should not take the best beast of which the tenant died possessed (117); but where the render is of an ox or other beast, and not defined to be the best, the election is in the tenant, if he has more than one of that description of animal (118).

It behoves the lord to seize soon after the heriot accrues, as his right, if he should make choice of a horse, would be concluded by a sale in market overt, under the requisites of the statutes 2 P. & M. c. 7. 31 Eliz. c. 12. (119).

dleton, ante, (n. 112). Gilb. Rents, 171. But *qu.* as to the extinction of heriot custom in freehold cases? and see Kitch. 264. 2 Vol. Watk. on Cop. 160, 161. Co. Litt. 149. b. Com. Dig. Cop. 519. (K. 23.)

(115) See the authorities in n. (114).

(116) Bro. tit. Hariots, pl. 2. 38 Ed. 3. fo. 7. Kitch. 263-4. 2 Bl. Com. 424. Plow. 96. 2 Vol. Watk. on Cop. 162.

(117) *Odiham* v. *Smith,* Cro. Eliz. 590. 18 H. 7. 5. Bro. Tit. Hariots, 11. and see Hob. 60.

(118) *Odiham* v. *Smith,* sup. Plow. 96.

(119) Kitch. 265, cites 16 E. 3 Fitz. Har. pl. 2. *Shaw* v. *Taylor,* Hut. 4, 5. S. C. Hob. 176. 2 Inst. 713. 2 Bl. Com. 450.

The seizure must be of the best beast belonging to the tenant at the time of the death or alienation, and it will be a good plea in avowry, that the property was not in the tenant at that period (120).

And it should seem by the case of *Trinity College Cambridge* v. *Browne* (121), that a bill will lie in equity for the discovery of the best beast.

The lord of necessity loses his heriot when the tenant at the time of the death or alienation have no beast (122), yet if the executor delivers his own beast, it is thought that he cannot afterwards say it was not the beast of the deceased tenant (123).

But the right of the lord to his heriot is not to be defeated by devise (124), and any disposition made expressly "to the end, purpose, and intent to defraud the lord of his heriot," would be void;

(120) Kitch. 267, Gilb. Dis. 146.

(121) 1 Vern. 441. But not for the discovery whether this or that person is most able to answer the heriot, *Lord Montague* v. *Dudman*, 2 Ves. 399.

(122) *Shaw* v. *Taylor*, sup. Carter, 86. And also, I conceive, when the tenant has not a *sole* right of property in the beast. Vide Kitch. 264; and see 2 Watk. on Cop. 166 N. (n). 2d Ed.

(123) 2 Vol. Watk. on Cop. 167. cites Mich. 7 Ed. 3. pl. 26. fol. 50, 51.

(124) Co. Litt. 185. b. where it is said that the heriot shall be paid before the mortuary, which Mr. J. Blackstone denominates a sort of ecclesiastical heriot, 2 vol. Com. 425. And see Co. Litt. 185. b. Fleta. lib. 2. c. 50. Bract. lib. 2. f. 60. Britt. f. 178. Kitch. 264. 1 vol. Ca. & Op. 219.

yet the fraudulent intent is to be proved by the lord (125).

The heriot of the best dead good is confined to a personal chattel, and is no charge on the land any more than a relief (126).

Heriot custom may be seized by the bailiff or other officer of the manor, for the lord's use (127), wherever it may happen to be found, whether upon or in any place out of the manor (128); and if it be eloigned the lord may have trover or detinue for it (129), but he cannot break open a stable, or even enter on the land of a stranger, unless the beast or other chattel be stolen (130).

The action of trover or detinue seems to be the

(125) Stat. 13 Eliz. c. 5. 2 Leo. 8. 2 Ves. 397. *Tirer* v. *Littleton*, cited 10 Co. 56 a. 2 Browal. 187. 2 Watk. on Cop. 169, 170.

(126) Co. Cop. s. 24. Tr. 24. 2 Bl. Com. 424. Fitz. Avowrie, 233. Bract. lib. 2. c. 36. s. 9. f. 86. a. Fleta. lib. 3. c. 18, f. 212. Britt. c. 69. But see H. 8. H. 7. 10. b. 11. a. 2 Watk. on Cop. 142. (n. e), and *qu.* as to heriot service?

(127) Fitz. Har. 5. 2 Vol. Watk. on Cop. 166, cites Termes de la Ley, tit. Hariot. And it has been said that even a stranger may seize to the use of the lord. Per Keble. P. 2. H. 7. 1. f. 15. b. 2 Watk. on Cop. 166.

(128) Kitch. 264-5. 2 Inst. 131-2. *Gresham* v. *Gainsford*, Bendl. 18. 2 Nels. Abr. 931. *Parker* v. *Gage*, 1 Show. 81. *Austin* v. *Bennet*, 1 Salk. 356. 3 Salk. 333. 2 Roll Rep. 208. Keilw. 84. b. So also as to heriot service founded on ancient tenure, but *suit heriot*, or heriot reserved by deed at this day, could not be seized off the manor. *Ante*, p. 426-7 (n. 67, 75).

(129) Kitch. 263, 267, cites 13 Ed. 3. Bro. tit. Hariots, 9. Co. Cop. s. 31. Tr. 44.

(130) 2 Roll. Rep. 56, in *Higgins* v. *Andrews*, 3 Bl. Com. 4.

lord's best remedy in all cases where a seizure cannot be made, but when he is deprived of his heriot by a fraudulent conveyance, he may have an action *qui tam*, under the third section of the 13 Eliz. c. 5. and shall recover the value of the heriot, if not the moiety of the value of the whole of the chattels which may have been fraudulently conveyed (131).

As the heriot must be of the beast of the tenant, it follows that the lord cannot *seize* the beast of a stranger *levant et couchant* on the lands, not even by a special custom (132), but the person replevying must shew that it was not the tenant's beast (133).

And when no heriot is due, and the lord seizes, the owner may replevy or have an action of trover or trespass (134).

(131) *Creswell* & *Coke's* case, 2 Leo. 8. S.C. Dy. 351. b. If the alienor held lands of several lords, each of them, as it would seem, might have an action *qui tam* on the statute, to recover according to his grievance, Lex Man. 114.; and this is an argument against the lord's right to recover more than the value of the heriot, under the action *qui tam*; but see 2 Watk. on Cop. 170-1.

(132) *Wilson* v. *Wise*, Mo. 16. S.C. Bendl. 39. *Lyne or Pyne* & *Bennet*, Benl. & Dal. 302. *Henley* v. *Taylor*, Ib. 77. *Parker* v. *Combleford*, Cro. Eliz. 725. *Parton* v. *Mason*, Dy. 199. b. 2 And. 153. 2 D'Anv. 427. pl. 6. *Thorne* v. *Tyler*, Mar. 165. Lex Man. 116. 2 Vol. Watk. on Cop. 166. But a custom to *distrain* the cattle of a stranger for a heriot, is a good custom, the property not being altered by the distress. Mar. 165. *Ante*, p. 425.

(133) *Jordan* & *Martin*, 1 Mod. 63.

(134) *Bishop* v. *Viscountess Montague*, Cro. Eliz. 824. S.C. Cro. Jac. 50.

Where a plea of justification in trespass for taking two horses as heriots, stated a custom that the lord of the manor for the time being, from time whereof, &c. *until the division into moieties* of a certain tenement, had taken upon the death of every tenant dying seized *in respect of such tenement*, and *since the said division* had taken after the death of every tenant dying seized of the said moieties or either of them *in respect of each such moiety*, one of the beasts, &c. and it appearing in evidence at the trial that the division of the tenement was made since the time of legal memory, a question arose upon the construction of the plea, whether it confined the division of the tenement to time beyond legal memory or not. A verdict was taken for the defendants by direction of the judge, Mr. B. Thomson, on this as well as upon certain other pleas, and for the plaintiffs upon the rest; with liberty for the plaintiffs to move to enter a verdict for them on the issue in question. A rule *nisi* was granted for this purpose by the Court of King's Bench, and the counsel for the defendants, in shewing cause against the rule, contended that the evidence supported the substance of the plea, which did not necessarily import that the division of the tenement was before the time of legal memory, but it might be read either way: The court, however, (stopping the counsel in support of the rule) observed, that the whole was stated as one immemorial custom, which was disproved

by shewing the division to have taken place within time of memory; and therefore made the rule absolute (135).

It was decided in the case of *Parkin* v. *Radcliffe* (136), that evidence of a custom for the homage to assess a certain sum of money as a heriot, and that such assessment had always been made with reference to the best chattel of the tenant, would not support an avowry for a heriot in kind.

And on a justification by the lord of the manor, under a custom that the lord should have the best beast on the tenant's death, the custom proved being that the lord should have the best beast *or good &c.*, the variance was held fatal by the whole court of C. B. (137): and the reason that you cannot avow for a heriot generally, is, that the plaintiff would otherwise be ousted of his plea in bar, that the tenant left no beast (138).

OF THE STEWARD'S FEES.

THE steward's fees, like the lord's fine on ad-

(135) *Kingsmill* v. *Bull*, 9 East, 185.

(136) 1 Bos. & Pul. 282, 393. *Ante*, p. 426.

(137) *Adderley* v. *Hart*, T. 4 Geo. 1. 1 Bos. & Pul. 394. n. a. And see *Griffin* v. *Blandford*, Cowp. 62. Supp. Vin. Cop. (P. 2.) pl. 6.

(138) Gilb. Dis. 146.; and see *Shaw* v. *Taylor*, and *Major* v. *Brandwood*, ubi sup.

In justifying under a prescription for an heriot, the lord must plead that he seized *for, or in the name of an heriot*, *Parton* v. *Mason*. Dy. 199. b.

mittance, are established by custom (139), and vary in almost every manor. A custumal of the fees taken, both in and out of court, on the surrender, and other acts connected with the transmission of the copyhold property within the manor, is generally handed down from steward to steward; but it frequently happens, that no such evidence of usage has been preserved, and then it has been erroneously supposed, that the amount of the fees is in the discretion of the steward, from whence it would follow, that if the fees which have been immemorially paid, are not consonant with the cravings of an extortionate mind, the steward has only to destroy the custumal or other evidence of the charges made by his predecessors, and to substitute a more extravagant table of fees.

But as it is usual for the steward to deliver a bill of fees to every copyholder upon his admis-

(139) Lord Coke, in his Copyholder, s. 33. Tr. 61. in dilating on Customs, says "Customs and prescriptions ought to be according to common right, and therefore if the lord will prescribe to have of every copyholder belonging to his manor, for every court he keepeth, a certain sum of money, this is a void prescription, because it is not according to common right, for he ought for justice sake to do it *gratis*; but if the lord prescribe to have a certain fee of his tenants, for keeping an extraordinary court, which is purchased only for the benefit of some particular tenants, to take up their copyholds and such like; this is a good prescription, and according to common right."

It has been lately decided that by custom, a steward, or his deputy, may have the sole right of preparing all surrenders of copyhold estates within the manor. *Rex* v. *Rigge*, 2 Barn. & Ald. 550. *Ante*, p. 31.

sion, and for all subsequent acts of customary assurance, I cannot imagine that there would be any difficulty in proving the ancient usage as to fees, in every manor throughout the kingdom; and where documents of this nature should not be produced in evidence, the steward could only recover such fees, in an action at law, as he might shew by collateral evidence to be reasonable.

When the charges made and insisted upon by the steward are deemed exorbitant, the copyholder may bring an action on the case to recover back the excess; and it has been suggested, that an indictment would lie for extortion *colore officii* (140).

It is generally supposed, that the established customary fees of whatever nature, are to be paid in respect of each separate copyhold, even if estates held under distinct titles are inserted in one copy (141); but it has been lately decided in the Court of Common Pleas, that, when no particular custom exists, the steward is not entitled to a distinct set of fees on the admission of a tenant to several distinct copyholds, and can only recover on a quantum meruit, unless there be a

(140) 1 Vol. Cas. & Opin. 233. The reader will find several opinions on the reasonableness of fees, *ib.* p. 223 to 233.

Vide 1 Jac. 1. c. 5. for preventing overcharges by stewards of Court Leets and Court Barons.

(141) *Searle* v. *Marsh*, B.R. Hil. 29 G. 3. A Surrender to Uses, of particular lands, will sometimes operate as an act of severance, to entitle the lord and steward to separate fines and fees, ante, p. 404. (n. 78.)

special convention (142); and from what was said, arguendo, by the counsel for the defendant in that case, it would seem that the case of *Searle* & *Marsh*, was decided by Lord Kenyon upon evidence of usage, and that without usage, it would have stood on a quantum meruit.

And when by the custom distinct fees are payable in respect of each separate tenement, the custom, I apprehend, if resting on such general and undefined terms, would be held to extend only to the fees payable on surrender and admittance, and not to the fees for presentment of a death, or for proclamations or the like (143); none, I imagine, could a steward justify a demand of distinct sets of fees on suffering a recovery of distinct copyhold tenements, as it is clear that the whole might be included in one plaint (144).

Where a copyhold is held in undivided shares, each share is a separate copyhold, for which a distinct set of fees may be demanded when the usage is for the steward to receive a separate set of fees for the surrender of, and admittance to, each copyhold tenement; nor will such separate copyholds unite, even after a partition: these points were decided by the Court of King's Bench in the case of *Attree* & *Scutt* (145), which was an action brought by the steward of the ma-

(142) *Everest* v. *Glyn*, 6 Taunt. 426. S. C. 2 Marsh, 84.

(143) 6 Taunt. 427, 429, 430, in *Everest* & *Glyn*.

(144) 8 Co. 47. b. 48. a. in *Webb's* case.

(145) 6 East, 476. S. C. 2 Smith's Rep. 449.

nor of *Brighthelmston* & *Atlingworth, in Sussex*, for bills of fees, tried at Lewes Summer Assizes, 1804. The defendant paid a sum into court, and there was a verdict for the plaintiff subject to the opinion of the Court of King's Bench, on a case reserved, which was in effect, whether on a sale by one of two tenants in common of part of five distinct copyhold tenements, after a partition between them and their admittance to the lands allotted in severalty, the steward could demand ten distinct sets of fees; viz. five sets of fees for the moiety which the copyholder took by devise, and five for the moiety which he took by the surrender under the partition; and Lord Ellenborough, (after observing that there was no privity between tenants in common, who hold by several titles, and shall do several services (146), and that one of the arguments by Lord Holt, in *Fisher* & *Wigg* (147), against construing a surrender to A., B., and C., equally to be divided between them as creating a tenancy in common, was, according to the report in Peere Williams, that by such a construction, instead of one copyhold estate and one fine and single service, there would be five several copyholds and as many fines and services,) held, that the tenements must be considered as distinct for the purpose of the steward's demand, which was consequent upon the right of the lord to several services, and the

(146) *Ante*, p. 396-7. (147) *Ante*, p. 168-9.

necessity of several admittances to the several tenements.

But although this multiplication of fees in favour of the steward is unquestionable, yet it is but an act of justice to say, that it is a very general practice with men of liberal minds, to compound the fees when, from the subdivision of the property, as among tenants in common, an enforcement of the strict right would be a serious hardship to the copyholder.

It has been doubted in practice, whether the steward is not entitled to distinct fees on the admittance of coparceners, but as one fine only is payable by them, so I apprehend only one set of fees can be claimed by the steward, unless indeed when coparceners *elect* to be admitted separately, and then, as the admissions are distinct, the fees must be so likewise: it may be urged, that the interests of coparceners, for the purpose of deciding the above question as to fees, are more to be assimilated to the interests of tenants in common, than of joint-tenants, and therefore that separate fees may be demanded as of tenants in common; but it is to be recollected not merely that one fine only is payable on admission in coparcenary, but that, although coparceners transmit distinct estates on death, yet they come in to one entire feud, and may at common law release privately to each other as joint-tenants may, but which tenants in common cannot do.

CHAP. VIII.

OF GUARDIANSHIP.

We have seen that, by special custom, the lord may be entitled to the profits of the land of an infant copyholder, or may assign the guardianship to whom he pleases (1).

But when no such custom exists, the wardship of the infant belongs of right to the guardian in socage, which means the next of kin of such infant to whom the copyhold cannot descend (2), so that when there is any peculiar custom as to descent, the socage guardian, by possibility, may not be entitled to the wardship of the infant copyholder.

It must be recollected that it is a moot point, whether the father can appoint a guardian to his child as to copyhold lands, under the statute of Charles the Second, when there is no special custom authorising the lord to take the profits or appoint a guardian to the infant copyholder, though the better opinion is that the father has

(1) *Ante*, p. 63.

(2) *Egleton's* case, 2 Roll. Abr. 40. Gard. (P.) pl. 1. Keilw. 186. a. pl. 1. Co. Cop. s. 59. Tr. 136. Co. Litt. 88. b. n. 12. & 13. Gilb. Ten. n. 172. Com. Dig. Cop. (E.) Plow. 297. See the cases, *ante*, p. 63. (n. 37.)

that power (3); and it is to be recollected that the guardianship of such infant ceases at 14, though, by the custom of some manors, it continues till 15, and even, perhaps, until one-and-twenty (4).

By the custom of most manors, proclamation must be made at three successive general courts, for the heir to come in and be admitted; and where general courts have been held annually, it would seem, therefore, that the heir has three years allowed him for making his claim, which time must of course be allowed to the guardian; but in some few manors the old law prevails, the custom being that the claim must be made within a year and a day after the ancestor's death.

If neither the infant nor his guardian appear within the period prescribed by the custom for the heir to claim to be admitted, the lord may seize *quousque;* but an infant, even before the statute of 9 Geo. 1. c. 29., was not bound by a custom that the lands might be seized as forfeited, for non-appearance (5); and by infancy in this particular case, I apprehend, is meant the whole minority of the heir, and not that portion of it only during which the heir is in ward.

And now by the above statute of 9 Geo. 1. if an infant *claiming by descent or surrender to will* (6), does not appear to be admitted, either in per-

(3) *Ante,* p. 100, 106. And see Keilw. 186. a. pl. 1.

(4) 2 Watk. on Cop. 109, 110. *Wade* v. *Baker* & *Cole,* 1 Ld. Raym. 131.

(5) *Ante,* p. 344.

(6) *Ante,* p. 345.

son or by guardian, after the customary proclamations, the lord may appoint a guardian or attorney to the infant, for the purpose of such admittance and for the recovery of the fine, in the manner prescribed by the act.

The guardian of an infant copyholder is accountable to the infant in like manner as a socage guardian in freehold cases, except indeed in the instance of a special custom, intitling the lord to the profits of the copyhold tenement, during the minority of the infant (7).

It would seem that the personal service to the lord, of suit of court, must be performed by the infant, and not by the guardian, it being in all cases the infant, and not the guardian, that is admitted (8); but that an infant is excused from services until the age of 14, and that neither the infant nor his guardian can be called upon to do fealty (9).

The interests of the infant copyholder cannot be affected by the acts of the guardian, but if the guardian commit waste, or neglect the duties of his office, he shall forfeit the wardship.

Those duties, we are told by Mr. Watkins (10), are two-fold. In the first place, he observes, it

(7) See 1 Leo. 266, Ca. 357. *ante*, p. 63.

(8) *Ante*, p. 346. And yet the guardian has an interest, Cro. Jac. 99, 10 East, 494, post. n. (11) & (12); but all is for the use of the infant, Keilw. 186. a. pl. 1. 10 East, 493-4.

(9) *Ante*, pp. 414, 415, 419.

(10) 2 Vol. on Cop. 105-6.

is his province to cultivate and manage the lands as may be most advantageous for the infant; and for this purpose, (he adds) he may make such a lease as is warranted by the custom, so it exceed not the minority of the ward (11), and also maintain debt for the arrears of rent (12).

In the next place, says Mr. Watkins, he is to render such returns to the lord as a copyholder

(11) Cites *Wade* v. *Baker* & *Cole*, 1 Lord Raym. 131. Hut. 16, 17, in *Drury* v. *Fitch*. And see 10 East, 493. Vide also *Cole* v. *Walles*, 1 Leo. 328, in which it was decided, that a guardian appointed by the lord, pursuant to a custom of that nature, might maintain an ejectione custodiæ; or at least an action upon the case in nature thereof: Vide S.C. called *Cole* v. *Wall* & *Burnell*, Cro. Eliz. 224.

(12) Cites *Sowper* v. *Goodbody*, Dy. 303. a. marg. And see 1 Vern. 262. *Shoplane* v. *Roydler*, Cro. Jac. 98. *Bedell* v. *Constable*, Vaug. 182-3. Such guardian may also avow in his own name, Vaill. Dy. 303. a. n. (46). *Wade* v. *Baker* & *Cole*, sup. Vide also *The King* v. *The Inhabitants of Oakley*, 10 East. 494-5: It was decided in the latter case, that a guardian in socage residing on the ward's estate for 40 days, gains a settlement in the parish, being irremovable from the property during the guardianship; And see *Rex* v. *The Inhabitants of Wilby*, 2 Mau. & Sel. 509: But a guardianship in socage exists only in the case of a legal estate, and where the heir takes by descent. *Rex* v. *The Inhabitants of Toddington*, 1 Barn. & Ald. 560.

A trustee or mortgagee in possession, may gain a settlement by 40 days' residence. *Rex* v. *St. Michael's, Bath*, 2 Doug. 630. *Rex* v. *The Inhabitants of Oakley*, sup. 2 Nolan, 85: But a purchaser under £30 cannot gain a settlement by 40 days' residence on the property. 9 Geo. 1. c. 7. s. 5; and yet he is irremovable. *Rex* v. *Martley*, 5 East. 40. And see *ante*, pp. 22-3, 87 (n. 84).

may render by another (13). He must pay the rents and perform the rustic or agricultural services, as to plough the lord's land, to reap or gather in his corn, &c. (14).

(13) Cites Calth. 51-2. (14) *Ante*, p. 413.

CHAP. IX.

OF TRUST ESTATES.

I PROPOSE to divide the subject of our present consideration under the three distinct heads of, Trusts Executed, Resulting Trusts, and Executory Trusts.

TRUSTS EXECUTED. *(And herein of contingent remainders, and of the lord's recognition of trusts.)*

Copyholds we have seen are not within the statute of uses (1), but when a surrender is made by A. into the hands of the lord, to the use of B. in trust for C., the legal estate remains in B. according to the express terms of the surrender, and C. has no right but in equity: and although no trust should be expressed in the surrender, the copyholder, as between himself and any other persons, except the lord, may by a separate instrument, so model the usufructuary interest as to meet all the purposes of convenience or caprice, yet so only that the equitable interest, (as far as the lord would be compellable to give effect to any instrument, the object of which was to unite the legal estate to the equitable,) should not be in-

(1) *Ante*, p. 104.

consistent with the established customs of the manor (2); and, with the same qualification in favour of the lord, all the rules which our courts of equity have established for enforcing moral or natural obligations in freehold cases, equally apply to copyholds (3).

Contingent remainders. It is the usual practice in settlements of copyhold estates, not to insert a limitation to a trustee to preserve contingent remainders (4); and the reason of this variation from the form of settlements of freehold property, is, that any contingent remainders limited by the surrender, are supported by the freehold in the lord of the manor: this reasoning is attacked by Mr. Watkins, who observes (5), that it appears rather extraordinary, that an estate of freehold in the lord should be supposed capable of supporting a copyhold remainder, since they are wholly

(2) *Ante*, p. 80.

(3) *Ante*, p. 260. et seq. And when a person who has purchased a copyhold estate in the name of a trustee, who is admitted, dies intestate and without an heir, equity, I conceive, would consider the purchase money as a lien upon the estate, and decree it to be sold for the benefit of the next of kin. *Sed vide post.* p. 462, &c. as to an equitable escheat; and Belt's Supp. to Ves. Sen. p. 349.

(4) But this is sometimes done with the consent of the lord; and even a surrender to A. on condition to perform the will of the surrenderor, would vest an estate in the dormant surrenderee, sufficient to support a contingent remainder limited by such will. *Gale* v. *Gale*, 2 Cox Ch. Ca. 136.

(5) 1 Vol. on Cop. 193. And see Atherley on Marr. Sett. p. 365.

distinct in their nature; but that learned gentleman seems to have thought, that the lord would be compellable to admit the contingent remainder-man on the death of the tenant for life, on whose forfeiture the lord seized, if the contingency happened in the life-time of such tenant for life, and that because of the lord's own act in accepting the surrender (6). But although there is an apparent inconsistency in a freehold interest being capable of supporting a contingent remainder of copyholds, yet I submit that the interest in the lord, and that only, does preserve to the contingent remainder-man a right which would not otherwise exist; for, supposing the remainder-man, and not the lord, was entitled to enter upon the forfeiture, then in as much as the precedent estate was forfeited before the period when the remainder was designated to commence, it could never take effect, unless indeed the rule, that a contingent remainder must take effect either during the continuance of the particular estate, or *eo instanti* that it determines, is not applicable to copyholds; and I can discover no good reason for any distinction in this respect, between freeholds and copyholds (7), except only in the effect of the forfeiture by the tenant of the particular estate, which, in freehold cases, lets in the first vested remainder-man, and in copyhold cases brings the estate into the hands of the lord for the

(6) 1 Vol. on Cop. 195.

(7) See 2 Cox Ch. Ca. 141, in *Gale* v. *Gale.*

life only, or other interest, of the person committing the forfeiture; it being decided, that the forfeiture by the tenant of a particular estate does not affect those interested in remainder (8). And if the lord, because of his privity in the settlement of the estate, is bound to admit the contingent remainder-man, should the contingency happen before the determination of the particular estate, is not the lord's possession to be deemed a constructive continuation of that estate, for the benefit of such contingent remainder-man?

But the expression, that the lord is bound to grant the estate to the remainder-man, agreeably to his own act, on the happening of the contingency, would seem to be incorrect, as the admittance of the tenant for life is the admission of all in remainder (9); in either way, however, the right is preserved to the contingent remainder-man by the possession of the lord;—if admittance be not necessary, then such right is a legal one, and if it be necessary, then the right is in equity.

And it is to be observed, that although the interest of the particular tenant is forfeited, yet the demiseable nature of the estate continues, and the lord may, if he pleases, re-grant it to hold by copy (10): and the existence of this peculiar quality, even after the union with the freehold interest, would seem to explain away the apparent inconsistency of the interest in the lord being

(8) *Post.* tit. Forfeiture.
(9) *Ante,* p. 353.
(10) *Ante,* pp. 17, 18, 109 &c., 118.

capable of preserving a contingent remainder in copyholds.

The application of the above rule, as to the destruction of the particular estate before the happening of the contingency, to copyhold lands, is sanctioned by Chief Baron Gilbert, who says, "If an estate be given to a copyholder for life, "the remainder to the right heirs of J. S. if the "tenant for life die, living J. S., there it seems "clear that the remainder is destroyed, for it "cannot take effect as by the limitation it ought. "But then, if tenant for life in that case, had "committed a forfeiture, or made a surrender, "and then living tenant for life, J. S. had died, "it seems to be very clear that his right-heir "might take; for his estate in remainder was "not to take effect after the determination of "the interest of tenant for life, but after his "death, and when that happened he was able to "take (11)."

The lord's interest being capable of supporting a contingent remainder, was also recognized in *Mildmay* v. *Hungerford* (12), *Lovell* v. *Lovell* (13), *Habergham* v. *Vincent* (14), *Stansfield* v. *Habergham* (15), *Roe* d. *Clemett* v. *Briggs* (16), and in many other cases.

(11) Ten. 265-6; but see *ib.* n. 122.

(12) 2 Vern. 243.

(13) 3 Atk. 12, 13.

(14) 2 Ves. Jun. 209, 210, 214. S.C. 4 Bro. Ch. Rep. 364.

(15) 10 Ves. 282.

(16) 16 East, 413: And see 1 Fearne, 470. *Pawsey* & *Lowdall*, Sty. 249, 273. *Margaret Podger's* case, 9 Co. 107. 2 Roll. Abr. 794. pl. 6.

I must not, however, pass over an interesting observation of Mr. Watkins's on the subject now under consideration. He says, "In the case of "freeholds there must have been a tenant of the "freehold against whom a *præcipe* might have "been brought (17); but no *præcipe* can be "brought of copyhold lands as such. Claims to "copyhold interests must be supported against "strangers by *plaint*, and against the lord by pe- "tition. With respect to the plaint, one would "presume that the law would be analogous to "that of the *præcipe*; and, consequently, that "the rule *would* therefore apply: since there "seems to be the same reason for an existing "tenant to the latter as the former. Though, "perhaps, the right to sue by petition, when the "premises were in the hands of the lord, may be "supposed to do away its necessity (18)."

The learned reader will clearly perceive, that the concluding passage removes any doubt which the whole paragraph may raise, on the question of the freehold interest in the lord being capable of preserving a contingent remainder, as it leaves no possible ground of argument against that position, by any analogy to the necessity in freehold cases, that there should be a person against whom a *præcipe* might be brought: more especially from the circumstance I have laid some stress upon, of the continuation of the demiseable, and

(17) See 2 Cox Ch. Ca. 151. (18) 1 Vol. on Cop. 193-4.

consequently of the copyhold, quality, after the forfeiture to the lord (19).

It is, at all events, quite clear that there is no distinction between freehold and copyhold estates, in those cases where the particular estate expires before the happening of the contingency, but that if a tenant for life of copyholds, who has forfeited his interest to the lord, should die before the remainder becomes vested, such remainder can never take effect (20).

It has been suggested that, as the lord, in case of a forfeiture by tenant for life, is intitled to the land for his own use during such particular estate, a limitation to a trustee to preserve contingent remainders should be always inserted in copyhold settlements, the same as is done in freehold cases, that is, when the legal inheritance is not vested in a trustee (21). And again, that, as on a limitation to A. for life, with remainder over to B., the estate of B. cannot take effect in possession till the death of A., and that the lord may enter between the determination of A.'s estate and his death, it is therefore proper in limiting a remainder of copyholds, to limit the estate expressly to A.,

(19) And see 3 Atk. 12, 13. 2 Vern. 243. 1 Fearne, 470. *Chapman* v. *Blissett*, Ca. Temp. Talb. 151.

(20) *Lane* v. *Pannell*, 1 Roll. Rep. 238, 317, 438. *Habergham* v. *Vincent*, 2 Ves. Jun. 214. S.C. 4 Bro. Ch. Rep. 364. Gilb. Ten. 265, 303. 1 Fearne, 470, 471.

(21) Atherley's Marr. Sett. 570.: And see *Stansfield* v. *Habergham*, 10 Ves. 282; and the observations on S.C. post. tit. 'Right of property in Trees & Mines.'

for his *natural* life, and from and after the determination of that estate by death, *forfeiture*, or otherwise, to the use of, &c. (22).

I agree in the expediency of these suggestions, but I apprehend that the lord would not be compellable to accept a surrender so framed, and which would be calculated to defeat his right of entry for the forfeiture of a tenant for life, or other particular estate; this would at least merit great consideration by any steward, to whom a surrender of that nature should be proposed.

The lord's recognition of trusts. A doubt has frequently arisen in practice, whether the lord of a manor is bound to take notice of the trusts which a copyholder may be desirous of creating, and the reason generally assigned by stewards for refusing to record notice of trusts, is, that the lord would be involved in any breach of trust on the part of the trustee: it is, however, quite absurd to suppose that the lord, who is merely custom's instrument, should be bound to see to the performance of any trusts, expressed in or referred to by the surrender.

Although I cannot conceive that the lord is compellable to take notice of any private agreement or trust of the parties, yet to refuse a copyholder the privilege of surrendering upon particular trusts, or, at least, of referring in the surrender to the deed or other instrument by

(22) 1 Watk. on Cop. 197. *Post.* tit. Forfeiture.

which it is proposed to declare the trusts, is, under ordinary circumstances, an act of great injustice, as it involves him in considerable additional expense in substituting a set of legal limitations, or in the still greater evil of putting it in the power of the trustee, if unjustly disposed, to defeat the objects of the trust, leaving the *cestui que trusts* no remedy but in equity [see *Robes* v. *Bent* & *Cock*, Mo. 552]; and for want of the aid of the statute of uses, the various provisions of a marriage settlement, can seldom be carried into complete effect as to copyhold property, without the intervention of a trustee.

I must also protest against the pertinacity of stewards of manors, in sometimes refusing to enrol a marriage settlement, or other deed of trust, merely with reference to the date of it and the names and descriptions of the parties; as it is only deferring the disclosure of the particular trusts, until a necessity arises of some copyhold assurance on the part of the trustee, when the court will satisfy itself, by the production and inrolment of the relative provisions of the deed, of the propriety and consistency of the proposed act; and in the mean time, as the tenancy is filled by the trustee or his heir, the lord can sustain no inconvenience: but the right to call for a complete disclosure of the trusts on the admittance of a trustee (23), is consequent on the right to refuse to take notice of any trusts whatever.

(23) See 13 Ves. 240 in *Lord Kensington* v. *Mansell.*

And when the legal estate is not vested in a trustee, the uses should be specified, as it might be very inconvenient to frame the surrender with reference to the uses of a settlement of freehold property (24).

Viewing this question merely as it regards the lord's interest, I am at a loss to discover any good reason for withholding from the copyholder, the privilege of putting notice of such trusts as he may be desirous of creating, upon the face of the court rolls; except, indeed, that according to the *dictum* of Lord Mansfield, in *Burgess* v. *Wheate* (25), if the lands escheat, the lord shall

(24) See the observations of Lord Erskine, C. in *Lord Kensington* v. *Mansell*, 13 Ves. 244.

(25) 1 Sir W. Bl. 167. S.C. 1 Eden's Ca. Ch. 177. His lordship there says, "In all manors where admission is necessary to alienation, the escheat is absolute, the lord's consent being still necessary. In those copyholds the lord is not bound by debts, alienation, or trusts; they are all void against him. But if he consents to a condition, or trust on the court roll, then he is bound by it, for he cannot claim against his own act." And see *Sir Harry Peachy* v. *The Duke of Somerset*, 1 Stra. 454. *Sed vide* 1 Sir W. Bl. 179; where the Lord Keeper doubted whether the estate should escheat discharged of the trusts.

In *Doe* d. *Freestone* v. *Parratt & Wife*, 5 T.R. 655, (which decided, that a surrender by the husband alone, passed no interest in copyhold lands devised to him and his wife in fee by a mortgagee in possession under a forfeited mortgage,) Lord Kenyon C.J. said, "this estate was given absolutely, and it has been considered as irredeemable by all the parties through whose hands it has passed. If the mortgagee conveys subject to the equity of redemption, that right may be kept alive for any indefinite length of time as far as I know: The Court of Chancery has de-

not be subject to any trusts, to which he is not privy.

But it may be urged against this pertinacity, that when the trusts are allowed by the lord to be enrolled (26), a court of equity, in the event of the death of the *cestui que trust* without an heir and intestate, would probably decree the person having the legal estate to be a trustee for the lord (27); whereas it should seem, that when he

termined that it may be preserved for 50 years. But if 20 years have passed without any redemption, in whom does the legal estate vest?—In the mortgagee; *and it would escheat to the lord for want of the heirs of that person.*

(26) The lord partakes of the trust by an inrolment of a surrender to a purchaser, or to the use of a will, see 3 Ves. 756 in *Williams* v. *Lord Lonsdale.*

(27) In the above case of *Burgess* & *Wheate,* Lord Mansfield held, that a trustee could in no event take or transmit a benefit, 1 Sir W. Bl. 162.: and although the Master of the Rolls, (Sir Thomas Clarke) strongly contended against the principle of an *equitable escheat,* yet he admitted that the lord by escheat was called in some places *quasi hæres;* and the decision in *Burgess* & *Wheate,* that the escheat of a trust could not be enforced in equity against the heir of the trustee, was in opposition to the opinion, not only of Lord Mansfield, but also of Lord Thurlow. *Middleton* v. *Spicer,* Belt's Ed. Bro. Ch. Rep. 1 Vol. 204.; and see *Walker* v. *Denne,* 2 Ves. Jun. 170. *Barclay* v. *Russell,* 3 Ves. 430. Yet see Cary 14, 15, where it is said 'If *cestui que use* be attainted of felony, the lord shall not be aided by subpœna to have his escheat; and if the heir be barred by the corruption of his blood, then the feoffee as it seemeth shall retain the land to his own use; cites 5 E. 4. 7. Br. Feoffments al. uses, pl. 34.

It may, however, admit of a doubt, if the *cestui que trust* purchased the estate, whether equity would not consider the purchase money as a lien upon the estate

has not assented to any trusts, equity will not assist him, so long as he has a legal tenant to perform the services (28); and although a court of equity will not interpose as between the lord and the heir of the trustee claiming to be admitted, when the *cestui que trust* dies without an heir (29), yet a court of law will, in such a case, compel the lord to admit the heir of the trustee, to enable him to try his title (30); and when so admitted, we have yet to see what equity the

for the benefit of his next of kin. *Ante*, p. 454.

Since the publication of the first edition of this work, the profession have been favoured, under the well-merited sanction of Lord Chancellor Eldon, with a most useful supplement to the Equity Reports of Mr. Vesey, sen. by Mr. Belt, who, in his notes to the case of *Fawcet & Lowther*, p. 348, has noticed the author's observations on the doctrine of an equitable escheat, and dissents from the opinion he has ventured to express, that equity would decree the estate to be sold for the benefit of the next of kin, when the *cestui que trust*, a purchaser, dies intestate, and without heirs, as the following passage, to which I beg to call the reader's particular attention, will shew, viz· "The author of these notes, individually, cannot assent to this opinion, because the money having been *invested in an actual purchase of land*, must have lost its pecuniary nature, which *alone* could create any equity whatever in favour of such next of kin. He submits the point as he finds it; and still the great question remains, as to whether there ought to be any escheat at all of trust estates, subject to the cases and observations above referred to."

(28) 3 Ves. 757. 1 Bro. Ch. Rep. 205. 1 Sir W. Bl. 175-9.

(29) *Williams* v. *Lord Lonsdale*, 3 Ves. 756.

(30) *The King* v. *Coggan and another*, 6 East, 431. S.C. 2 Smith's Rep. 417.

lord has, paramount such heir, supposing him to have refused to take notice of any trusts.

RESULTING TRUSTS.

THE person to whom the legal estate in copyholds is surrendered or granted, will be decreed in equity to be a trustee for him who advances the purchase money or fine of admission, on due proof of the fact of such payment; and in manors where copyholds are granted for two, three, or more lives in succession, if one only of the *cestui que vies* pay the fine, the other lives are trustees for him (31), whether or not there is a custom for the first taker to surrender the copy (32).

And the trust of an estate *pour autre vie* of copyholds, shall go to the executors or administrators, the same as in the case of freehold property (33).

(31) *Benger* v. *Drew*, 1 P.W. 780. *Withers* v. *Withers and others*, Amb. 151. *Roe* v. *Summerset*, 2 Sir W. Bl. 694. *Rumbold* v. *Rumbold*. Apr. 1761. *ib.* (marg.) S. C. cited in *Dyer* v. *Dyer*, 2 Cox Ch. Ca. 92. 1 Watk. on Cop. 223. 2 Atk. 75. *Goodright* d. *Langfield* v. *Hodges*, 1 Watk. on Cop. 227. *Finch* v. *Finch*, 15 Ves. 43. And see *Rider* v. *Kidder*, 10 Ves. 360.

(32) 2 Freem. 123. ca. 138. *Smith* v. *Baker*, 1 Atk. 385. *Howe* v. *Howe*, 1 Vern. 415.

(33) *Howe* v. *Howe*, *Withers* v. *Withers*, sup. *Rundle* v. *Rundle*, 2 Vern. 264. *Goodtitle* & *Hodges*, sup. And see *Watkins* v. *Lea*, 6 Ves. 633, where the trust was held to pass under the residuary disposition of personalty, and not under a previous devise of freehold and copyhold property, but by the custom of the manor the trust,

In *Smith* v. *Baker* (34), it was held, that although there be a custom in a manor, that, whoever purchases in it, the estate shall shall go in succession, yet if A. purchase for his own and two other lives, and by his will devises all his estates generally, he has an equitable interest, and the legal tenant according to the custom, is a trustee for him.

But where on a grant to three successively, there was no custom for the first taker to surrender the copy and dispose of the estate, and no proof of either having paid the fine, the court would not decree the remaining life to be a trustee for the first taker (35).

And the presumption which is raised from the payment of the purchase money, may be rebutted even by parol evidence (36).

The purchase in the name of a child, or nominating a child as a *cestui que vie* in the purchase of a copyhold for lives, is, from the natural obligation of a father to provide for his child, a circumstance of evidence to rebut a resulting trust of copyholds (37), unless the father's intention

in case of intestacy, was distributable as personal estate, and the testator had other copyhold property.

(34) 1 Atk. 385.; and see *Clark* v. *Danvers*, 1 Ch. Ca. 310.

(35) *Rundle* v. *Rundle*, 2 Vern. 264.

(36) *Dyer* v. *Dyer*, *Goodright* v. *Hodges*, ante, p. 465. 1 Vern. 366. *Taylor* v. *Taylor*, 1 Atk. 386-7.

(37) *Mumma* v. *Mumma*, 2 Vern. 19. 1 Eq. Cas. Abr. 382. pl. 8. *Taylor* v. *Taylor*, sup. *Dyer* v. *Dyer*, sup. (which overruled the case of *Dickinson* v. *Shaw*, 1 P. W. 112. n. (1).

that the children should be considered as trustees for him be shewn by some *contemporaneous act* (38); and this without regard to any other provision which the child may have (39).

And where a father purchased copyhold lands in his son's name, although the father *continued* in possession till his death, it was considered as an advancement for the son, and not a trust for the father (40); but this was on the ground that the father is the natural guardian of his son: And in *Murless* v. *Franklin* (41), Lord Eldon held, that possession *taken* by the father at the time, would amount to evidence that he intended the purchase to be for his own benefit: And when

2 vol. Col. Jurid. 291.;) and see *Lamplugh* v. *Lamplugh*, 1 P.W. 111. *Bedwell* v. *Froome* & *Kingdome* v. *Bridges*, cited in *Dyer* & *Dyer*. *Scroope* v. *Scroope*, 1 Ch. Ca. 28. *Lord Grey* v. *Lady Grey*, *ib.* 296. S.C. Finch, 338. *Elliot* v. *Elliot*, 2 Ch. Ca. 231. 3 Salk. 367. *Shales* v. *Shales*, 2 Freem. 252. *Woodman* v. *Morrel et ux.* Ib. 32. *Crop* v. *Norton*, 2 Atk. 75. *Stileman* v. *Ashdown*, 2 Atk. 480. *Jennings* v. *Selleck*, 1 Vern. 467. *Sheffield* v. *Lord Mulgrave*, 5 T.R. 574. *Swift* d. *Farr* v. *Davis*, 8 East, 354 (n. a). *Finch* v. *Finch*, 15 Ves. 43.

(38) *Dyer* v. *Dyer*, *Elliot* v. *Elliot*, ubi sup. *Ebrand* v. *Dancer*, 2 Ch. Ca. 26. *Swift* d. *Farr* v. *Davis*, *Woodman* & *Morrel*, sup. *Murless* & *Wife* v. *Franklin*, 1 Swanst. 13.

(39) *Dyer* v. *Dyer*, sup. *ante*, p. 281. But see Finch, 341.

(40) *Taylor* v. *Taylor*, 1 Atk. 386. 2 Atk. 480. *Lamplugh* v. *Lamplugh*, sup. In *Dowdswel* v. *Dowdswel*, 1 Ch. Ca. 261, the Lord Keeper agreed that the father being lord of the manor, could not declare the trusts of copyholds granted to his son, though he took the profits by his consent. The Reporter adds "Eadem die decreed between *Holford* &"

(41) Sup.

the purchase is of a reversionary interest, possession can afford no evidence until the death of the tenant for life (42).

It would also seem that a purchase in the joint names of father and son, would be deemed an advancement of the son, and not a resulting trust for the father (43): The right of a son may, however, be controlled by some particular custom(44).

A purchase in the name of a wife would be equally an advancement, as in the case of a child, but if the purchase were in the names of the wife and a stranger, it would be a resulting trust for the husband, as far as related to the estate of the stranger (45).

But where there is no moral obligation to make a provision, this doctrine does not apply; so that a purchase in the names of nephews and nieces, will not be considered as an advancement for them, unless aided by clear evidence of intention (46); and certainly, therefore, not so, when

(42) *Murless* & *Franklin*, 1 Swanst. 13.

(43) *Scroope* v. *Scroope*, 1 Ch. Ca. 28. *Back* v. *Andrews*, 2 Vern, 120. S. C. Pre. Ch. 1. but see *Stileman* v. *Ashdown*, 2 Atk. 480. *Pole* v. *Pole*, 1 Ves. 76.

(44) *Edwards* v. *Fidel*, 3 Madd. 237. And see *Greenwood* v. *Hare*, 1 Ch. Rep. 272.

(45) *Back* v. *Andrews*, sup. *Kingdome* v. *Bridges*, 2 Vern. 67. *Benger* v. *Drew*, 1 P. W. 780. 2 Freem. 33.

(46) *Taylor* v. *Alston*, cited in *Dyer* & *Dyer*, ubi sup. *Goodright* d. *Langfield* v. *Hodges*, ubi sup. But according to *Ebrand* v. *Dancer*, 2 Ch. Ca. 26. a purchase in the names of grandchildren, *the father being dead*, would be a provision for the grandchildren, and not a trust, unless a contrary intention was declared at the same time; *sed quære? Ante*, p. 263, 281-4. And see *Right* & *Bawden*, 3 East, 260.

the purchase is in the names of *great* nephews and nieces (47).

If a copyholder surrender or devise his estate to a trustee, in trust to sell for payment of debts, or for other partial purposes of conversion, the surplus estate, after the objects of the trust are satisfied, or the whole, should those objects entirely fail, will belong to the customary heir, by way of resulting trust, the same as in freehold cases (48).

And where two copyholders, upon a treaty of marriage between them, surrendered their respective copyholds to the use of them and the survivor of them, and the marriage did not take

(47) *Edwards* v. *Fidel*, 3 Madd. 237. See this case, ante, p. 30. I apprehend that the presumption could not be held to extend to natural children, *ante*, pp. 263 (n. 241), 284; but see Fearne's P. W. 327.

(48) *Cruse* v. *Barley* & *Banson*, 3 P.W. 20. N. (1). *ib.* 22. *Wilson* v. *Major*, 11 Ves. 205. *Lowes* v. *Hackward*, 18 Ves. 168. And see *Chew* v. *Chew*, Nels. Ch. Rep. 190. But the effect of the surrender or devise may be to break the descent to the heirs, and make them take as purchasers. *Swaine* v. *Burton*, 15 Ves. 365. The following cases will be found interesting on the subject of resulting trusts in favour of the heir. *Mallabar* v. *Mallabar*, Ca. Temp. Talbot, 78. *Durour* v. *Motteux*, 1 Ves. 322. *Cook* v. *Duckenfield*, 2 Atk. 567. *Hewitt* v. *Wright*, Belt's Ed. Bro. Ch. Rep. 1 Vol. 86. *Fletcher* v. *Ashburner*, *ib.* 497. *Ackroyd* v. *Smithson*, *ib.* 503. *Robinson* v. *Taylor & others*, 2 *ib.* 589. *Collins* v. *Wakeman*, 2 Ves. Jun. 683. *Sheddon* v. *Goodrich*, 8 Ves. 481. *Berry* v. *Usher*, 11 Ves. 87. *Wright* v. *Wright*, 16 Ves. 188. *Hooper* v. *Goodwin*, 18 Ves. 156. *Van* v. *Barnett*, 19 Ves. 102. *Hill* v. *Cock*, 1 Ves. & Bea. 173. *Maugham* v. *Mason*, *Ib.* 410. *Ashby* v. *Palmer*, 1 Meriv. 296.

place according to the treaty; and the man died, and the woman entered and enjoyed the property for 30 years, Lord Jefferies C. decreed a re-surrender, and an account of the profits from the death of the man (49).

It may be proper to observe, in conclusion of this section, that if a copyhold be purchased by the husband in the joint names of himself and his wife, they will both and each be tenants of the *entirety*, so that the husband cannot alien or devise the estate, to the prejudice of the wife's right of survivorship (50).

EXECUTORY TRUSTS.

IN decreeing an execution of trusts of copyholds, a court of equity is governed by the same rules as prevail with respect to freeholds, and it therefore distinguishes between trusts executed and executory.

So where a surrender was made of an estate of the nature of *borough english*, to the use of trustees, in trust, after payment of an annuity and some particular debts, to surrender the same to the use of the heirs of the body of the husband and wife, who had two sons; and when the annuities had ceased, and the debts were satisfied,

(49) *Hamond* v. *Hicks*, 1 Vern. 432.

(50) *Green* d. *Crew* v. *King*, 2 Sir W. Bl. 1211. *Back* v. *Andrews*, 2 Vern. 120. S.C. Pre. Ch. 1. *Purefoy* & *Rogers*, 2 Lev. 89.

each of the sons claimed the surrender in their favour, the eldest as heir at common law, and the youngest as heir by the custom;—but the trust being merely executory, the court directed a surrender to be made to the eldest son, as heir general by the common law (51).

And in *Roberts* v. *Dixwell* (52), the trust being executory, the Court of Chancery directed a conveyance to be made according to the rule of common law, and not according to the custom of gavelkind.

And again, by analogy to the rule in freehold cases, that an executory interest cannot be passed except by a fine operating as an estoppel (53), but that whatever is descendible is the subject of devise and contract (54), it would seem, that an executory interest in copyholds cannot be bound by a surrender, as that assurance does not operate by estoppel (55), but that it may be transferred by such modes as an executory interest in

(51) *Starkey* v. *Starkey,* in Ex. Tr. 19 G. 2. 7 Bac. Abr. 179. Kitch. 168. And see Com. Dig. Cop. (G. 1).

(52) 1 Atk. 607. *Ante,* p. 36-7. See further as to the distinction between trusts executed and executory, *Bagshaw* v. *Spencer,* 1 Ves. 142.

(53) 2 Fearne, 528.

(54) *Ib.* 522. 1 Vol. *ib.* 540, 541-2. *Roe* d. *Perry* v. *Jones and others,* 1 H. Bl. 33, (cites *Moor et ux.* v. *Hawkins,* in Canc. 1765.). *Jones and others* v. *Roe, lessee of Perry,* in error, 3 T. R. 88, cites *Goodtitle* d. *Gurnel* v. *Wood,* Tr. 14 G. 2. C. B.

(55) 2 Fearne, 528, n. (a), cites *Goodtitle* v. *Morse,* 3 T. R. 365. *Taylor* & *Philips,* 1 Ves. 229. And see Fearne's P. W. 108.

freeholds is transferrable; and, as a consequence, that it is deviseable (56), and may be extinguished by release (57), and would be bound in equity by any contract for a valuable or meretorious consideration (58).

(56) 2 Fearne, 530. *Selwin* v. *Selwin*, 1 Sir W. Bl. 225, 254. S. P. 2 Burr. 1134. *Roe* d. *Noden* v. *Griffiths*, 1 Sir W. Bl. 605-6.

(57) 2 Fearne, 58. *ib.* 529, 530. (n); and see *Lampet's* case, 10 Co. 46. b. *Wright* v. *Wright*, 1 Ves. 411.

(58) 2 Fearne, 530. *Hobson* v. *Trevor*, 2 P. W. 191. *Wright* v. *Wright*, sup.

CHAP. X.

ON THE RELATIVE RIGHT OF PROPERTY OF THE LORD AND TENANT, IN TREES AND MINES.

FIRST, AS TO TREES.

THIS subject appears to have been involved in much obscurity, and yet it is governed, I conceive, by clear and settled principles, similar to those which prevail as to freehold estates, and by which every case is capable of easy solution.

Copyholders it has been shown, are considered as tenants at will, and even when the estate is descendible, the tenant has only a *quasi* inheritance, and can do no act which would prejudice the lord's right in case of escheat or forfeiture.

In analogy to the rules at common law, the copyholder, whether of inheritance, or for life, or years, has the same possessory interest in the trees, as he has in the land.

But he is equally as incapable of cutting down trees, or doing any other act to the injury of the freehold, except with the lord's concurrence, as a tenant for life or years of freehold lands is, without the concurrence of those in whom the remainder in fee simple is vested; yet, as the law in copyhold cases takes notice of all reasonable customs, a copyholder of inheritance, under an

immemorial usage, may exercise an absolute proprietary right over trees, or other thing appendant to the copyhold tenement: but by the same rule, a copyholder for life or years, is not permitted, even under an alledged usage, to cut timber; such a custom being considered too unreasonable to be supported: it is to be observed, however, that by a copyholder for life or years, is meant a person to whom such an interest is granted by the lord, and not the particular tenant whose estate is carved out of the inheritance by the copyholder in fee; nor a copyholder for life with a power to renew, or who by the custom is allowed to nominate his successor.

I shall now proceed to a reference to the cases which have been decided on the subject under discussion, establishing, as I conceive, the above premises, and this deduction from them, namely, that, in the absence of any particular custom, neither the lord without the consent of the tenant (1), nor the tenant without the license of the lord (2), can cut down trees, any more than the particular tenant in possession, without the leave of the remainder-man in fee, or the remainder-man in fee without the concurrence of the particular tenant, can cut down trees in freehold

(1) This is now fully established by the case of *Whitechurch* v. *Holworthy*, 4 Mau. & Sel. 340, 19 Ves. 213, reported since the publication of the first edition of the present work.

(2) See *Edwards* v. *Heather*, Sel. Ca. in Ch. Temp. King, 3. 6 Vin. Cop. (R. e. 2). pl. 13.

cases; except, indeed, that by custom, the license of the lord under the terms of the original grant, to an act partaking of an absolute unrestrained dominion over copyhold lands *of inheritance*, may be presumed, in analogy to the exemption from waste, frequently attached to the interest of the tenant for life or years of freehold lands.

The reader will find, that the possessory interest of the tenant in the trees upon his copyhold land, was distinctly recognized in *Heydon* & *Smith's* case, 13 Co. 69, Godb. 173-4. *Rockey* v. *Huggens*, Cro. Car. 220. S. C. W. Jones, 245. *Earl of Kent* v. *Walters*, 12 Mod. 317. *Ashmead* v. *Ranger*, 12 Mod. 378, 11 Mod. 18, Salk. 638, Comy. 71, 1 Lord Raym. 551, Holt, 162, Fortes, 152; and in *Lord Banbury's* case, 11 Mod. 94-5 (3).

And that the proprietary right over trees *by particular custom*, is established in the copyholder of inheritance, or for life, with power to renew, or to nominate his successor; but is denied to the grantee for life without such power, by the authorities of *Stebbing* v. *Gosnal*, Cro. Eliz. 629. *Earl of Northumberland* v. *Wheeler and others*, 1 Bulst. 158, citing *Lutterell* & *Wood's* case, C. B. Brownl. 236. *Anon.* Noy, 2. *Anon.* Winch, 1. Hob. 11. *Glascock* & *Peche*, P. 6 Ja.

(3) Vide also the late case of *Whitechurch* & *Holworthy*, ante, p. 474. But it was formerly thought that the lord might cut down the trees on copyhold land, provided he left sufficient for estovers. Gilb. Ten. 239, 240. Godb. 174, cites *Doylie's* case, Mich. 25 & 26 Eliz.

B. cited 2 D'Anv. 426(4). *Brock* v. *Spencer*, Hob. 6. *Brock* v. *Beare*, 1 Bulst. 50. *Fuller* v. *Terry*, 1 Roll. Abr, 509. *Rowles* & *Mason*, 1 Brownl. 132. 2 Brownl. 85, 192. 2 D'Anv. 426. *Powel* & *Peacock*, Cro. Jac. 29. Noy, 2. *Rockey* v. *Huggens*, Cro. Car. 220. *Cage* & *Dod*, Sty. 233. *Mardiner* v. *Elliot*, 2 T. R. 746. And see Dal. 8. Lex Man. 63-4. Gilb. Ten. 237. 2 Ves. 303.

I have already stated that there is a distinction between a grantee for life or years of copyholds, and the particular tenant whose estate is carved out of the inheritance: and in the case of *Denn* d. *Joddrell* v. *Johnson* (5), which was an action of ejectment by the lord for a supposed forfeiture by tenant for life, the Court of King's Bench ruled, that although a copyholder for life, under a grant by copy for life, cannot cut timber, yet a copyholder of inheritance having power to do so by the custom of the manor, may make a person to whom he gives a life interest only in the estate, dispunishable for waste, and this on the ground, that the whole inheritance is out of the lord; and the above case coming within that distinction, the plaintiff was nonsuited.

It frequently happens that the copyholder is allowed by the custom of the manor, to cut down

(4) This case is also reported in 4 Leo. 238; and the custom is not stated there to be confined to copyholders of inheritance, but that is probably an omission.

(5) 10 East, 266.

timber for repairs only, and when that is the case and he does not make immediate use of the timber, the intention of cutting it for the purpose of repairs, and of applying it in due course, will be evidence to the jury in any action for a supposed forfeiture (6.)

When the custom is to have wood for repairs *or other necessary uses*, the right to sell any part of it will not be supported but upon the clearest evidence of usage: So in *Blackett* v. *Lowes* (7), where, by an agreement in 1656, between the lord and customary tenants, the former was authorised to take and dispose of wood and underwood, leaving sufficient for the necessary use and occasions of the tenants, and making them reasonable satisfaction for the damage they should sustain by taking and carrying away the same; and the tenants bound themselves not to cut down, sell, or dispose of timber or wood without the license of the lord, who agreed to allow them sufficient timber and wood growing on their respective tenements, for repairs and all other necessary occasions and uses, and that in case they

(6) *Doe* d. *Foley* & *others* v. *Wilson*, 11 East, 56. Where a person had two copyholds held of the same manor, and cut down timber on the one for the repairs of the other, equity relieved. *Nash* v. *Earl Derby*, 2 Vern. 537. 1 Stra. 450. But the Estovers of one estate cannot, of right, be applied to another, *Lee* v. *Alston*, 1 Bro. Ch. Rep. 194. Belt's Ed.

(7) 2 Mau. & Sel. 494. But it would seem that when the copyholder may cut timber for repairs, he may sell the lops, tops, and bark, towards defraying the charges of reparation, *Sandford* v. *Stevens* & *Smith*, 3 Bulst. 282.

planted any wood they might cut down, use, and dispose of the same for *repairs, or any other their necessary uses*, and which agreement was confirmed by a decree of the Court of Chancery; the defendant having cut down and sold wood without license, the lord recovered the value in an action of trover; but a question was reserved for the opinion of the Court of King's Bench, whether the tenant ought to have had the benefit of the evidence he tendered at the trial, of the tenants of the estate having for 30 years and upwards cut and sold planted wood, without interruption, and of a general reputation of the tenant's right to cut and sell such wood at pleasure. By Lord Ellenborough, C. J. "Although the whole "of the planted wood is the fund out of which "the tenant is entitled to cut down, and he might "maintain trespass against a stranger who cut "them down, yet, if he being only entitled to cut "them as estovers, cuts them down for aliene "purposes, the lord will be entitled. As soon "as the tenant cuts down for a foreign purpose "his right determines, and the lord's right com-"mences (8). Now here the tenant's right to

(8) When the trees are separated from the soil, by whatever act or casualty, the tenant's possessory right ends, and the lord may take them. *Ailner's* case, 1 Keb. 691. *Cage* v. *Dod*, Sty. 233. *Lord Banbury's* case, 11 Mod. 94-5. *Ib.* 68. pl. 1. *Mackerel* v. *Harrison*, Mich. 5 Ann B. R. cited as S. C. 6 Vin. Cop. (R. e.) pl. 11. *Ib.* (R. e. 2.) pl. 8. cites Brownl. 42. (nota). Godb. 234. Cro. Car. 242. Palm. 327. 7 T. R. 13. But the tenant may bring trespass against a stranger

"cut is for repairing, and for any other necessary "uses; and can it be argued to be for a neces- "sary use when the tenant cuts down, not for "any botes, but for a purpose perfectly aliene? "It seems to me that it cannot: and therefore "by the cutting the tenant's right determined. "As to the rejection of the evidence, reputation "is certainly out of the question, because the te- "nant's right could only arise by some grant or "deed; but as to the rest, I own my impression "would have been to have admitted it, though I "should probably have advised the jury, that it "was not of much weight against the plaintiff's "evidence; but still, if there be any species of "grant, which, being presumed, would have au- "thorised the tenant to deal with the wood as "she has done, she ought to have the benefit, "whatever that may be, of the evidence." And Bayley, J. and Dampier, J. concurring, the rule for a new trial was made absolute (9).

Estovers. It has been doubted by very emi-

for cutting down trees. Co. Cop. s. 51. Tr. 119. Kitch. 157. 2 H. 4. 12. And see ante, p. 369. n. 120.

(9) A grant of woods and underwoods to a copyholder of inheritance, by a lord intitled by the custom to the cut of the woods growing on the copyhold lands, does not merge the profit in the copyhold. *Faulkner* v. *Faulkner*, 1 Vern. 21-2. It was also decided in the above case, that an estate in copyholds may arise by implication under a will, when the devise is to the heir, but not if it be to a stranger, the same as in freehold cases; See Bro. Devise, pl. 52. Cro. Jac. 75. Cro. Eliz. 15. 2 Lev. 207. T. Jones, 98. *Dyer* v. *Dyer*, 1 Meriv. 414.

nent lawyers, whether copyholders are entitled to estovers of common right, and although it is generally considered that the right is incident to the grant (10), yet it must be recollected that all copyholders hold at the will of the lord, for an estate enlarged only by custom, and that tenants at will of freehold lands are not entitled to estovers (11); but there are few manors, if any, I apprehend, where the custom has not established the right.

And by custom, estovers may be taken on any part of the manor whereof the copyhold is held, even in the woods of the lord (12).

In the case of *Lord Montague* v. *Sheppard* (13),

(10) As copyholders are bound to keep the tenements in repair, there is certainly great reason to contend that the right of estovers is incident to the grant, and that no special custom need be shewn. See the 5th resolution in *Heydon* & *Smith*'s case, 13 Co. 69. S.C. 2 Brownl. 319, S.C. Godb. 173. cites 9 H. 4. Fitz. Wast. 59. But if there is no house it would seem that there can be no right to estovers. *Bishop of Chichester* & *Strodwick*, Godb. 234-5.; yet see Kitch. 113, 114.

(11) But a tenant who holds strictly at will is not bound to do repairs. Co. Litt. 57. a.

(12) *Foiston* & *Crachroode*, 4 Co. 32. a. *Withers* v. *Iseham*, Dy. 70, 71. 6 Vin. Cop. R. e. pl. 1. And the custom is not extinguished by a neglect to exercise the right, *Bishop of Chichester* v. *Strodwick*, sup.

(13) Cro. Eliz. 5.; and see *Swaine* v. *Becket*, Mo. 811, 812, where the cutting and lopping trees was justified, on the ground of there being a custom for the copyhold tenants to have estovers. S. C. 1 Brownl. 231. 8 Co. 63. *Vide* also *Stebbing* v. *Gosnal*, Cro. Eliz. 629. S.C. Mo. 546. *Crosse* & *Abbot*, Noy, 14.

The Court of Chancery will direct a commission to set out

it was held, that a copyholder could not take trees for house-bote, &c. as tenant for life or years might, without a special custom.

But in *Dawbridge* v. *Cocks* (14) the court ruled, that a copyholder might cut off the under boughs, which could not cause waste, though not the top boughs, as that might occasion the destruction of the tree.

And in *Heydon* & *Smith's* case (15), it was resolved, that a copyholder was entitled to estovers of common right, *as a thing incident to the grant.* The report adds, "but the same may be restrained "by custom, *scil.* that the copyholder shall not "take it, unless by assignment of the lord or his "bailiff, &c."

It was further resolved in the above case of *Heydon* & *Smith*, that trespass would lie by a copyholder against the lord for cutting trees.

And in *Ashmead* v. *Ranger* (16), Holt, C. J. (denying the authority of *Lord Montague* & *Sheppard*,) held, that if the lord cut down trees so as not to leave sufficient estovers, a copyholder for life in respect of his possessory interest might

sufficient timber and wood for the copyholder, for botes and estovers, according to the custom. *Ayray* v. *Bellingham*, Finch, 199. 6 Vin. Cop. (R. e.) pl. 9. And should the lord alien the waste or woods, or except them in a demise of the manor, it would not defeat the copyholder's right to botes and estovers. *Swain* v. *Becket*, ante, in this Note.

(14) Cro. Eliz. 361.; and see *East* v. *Harding*, *ib.* 292. 1 Leo. 272. ca. 365.

(15) 13 Co. 68.

(16) 1 Ld. Raym. 551. &c.; and see *Bourne* v. *Taylor*, *post.*

maintain trespass against him, and this judgment was afterwards affirmed in the Exchequer Chamber; but both judgments were reversed in the House of Lords, *ten* lords being for affirming, and *eleven* for reversing (17).

Where copyholders are allowed by the custom to cut down trees, equity will interpose in favour of a remainder-man, to restrain a party in possession from committing waste, the same as in freehold cases (18).

And in the case of *Stansfield* v. *Habergham* (19), the heir at law of a copyholder *taking by way of resulting trust, until the happening of a contingency*, was restrained by injunction from committing waste, Lord Eldon, Chancellor, observing, that the heir so taking was better entitled to preserve the timber, than a trustee for preserving contingent remainders, and could have no right

(17) The printed case in this appeal is in Mr. Serj. Hill's collection of cases in the House of Lords (now in Lincoln's Inn Library), on the back of which is written by Lord Chief Baron Ward—'This judgment was reversed by eleven against ten lords, and against the opinion of all the Judges of England.' 1 Cru. Dig. 324.

The action is maintainable when there is a custom entitling the tenant to the trees. *Ante*, p. 369, (n. 120). So where the tenant is entitled by custom to the lops of trees for fuel and repairs, and the lord cuts down all the trees. *Swain* v. *Becket*, *Stebbing* v. *Gosnal*, *Cross* v. *Abbot*, ubi sup. *Crogat* v. *Morris*, Brownl. 197. *Whiteband's* case, 2 Brownl. 149. 6 Vin. Cop. (R. e. 3.) pl. 3.

(18) *Cornish* v. *New*, Fin. 220.

(19) 10 Ves. 278.

in the consideration of a court of equity to cut timber; for that, even where there is an executory devise over of a legal estate, the court would not permit the timber to be cut down, more especially not in an executory devise of a trust estate: and an application to dissolve the injunction was refused.

In this case Lord Eldon, after expatiating on the practice of the court in giving effect to contingent limitations of freehold estates, by the interposition of trustees, when called upon to execute a trust, observed, "There is no difference as to the copyhold estate, for though it is "true the lord will preserve contingent remainders, I am not prepared to say it is as clearly "his duty to do so, as it is the duty of trustees "to preserve contingent remainders of freehold "estate to interpose actively to prevent waste; "and though trustees to preserve contingent "remainders are sometimes omitted in limitations of copyhold estates, both by settlement "and will, they are frequently created by express "limitation; and, whatever may be the case as "to the lord, if trustees are created by express "limitation for the purpose of preserving contingent estates, they would be guilty of a neglect "of their duty, by permitting a tenant for life "liable to impeachment for waste, or a tenant "*pur auter vie*, who by the nature of his estate is "liable for waste, to destroy that part of the "estate; viz. the timber."

It has been generally supposed, since the case of *Dench* v. *Bampton* (20), that equity would not interpose to prevent waste, as between the lord and copyholder, but leave the lord to his remedy for the forfeiture—that principle was, however, over-ruled in *Richards* v. *Noble* (21), which was a bill filed by the lord of a manor against copyholders for an account of turves cut, and taken, and for an injunction, not waving the forfeiture; and the Chancellor (Lord Eldon) said, that in many cases the forfeiture was a very inadequate remedy, and noticed the instance of a barren spot, upon which many valuable timber trees grow, where, if the copyhold tenant only forfeited his copyhold by cutting down those trees, he might be a gainer by his own wrongful act.

SECONDLY, AS TO MINES.

A copyholder, whether of inheritance, or for life or years only, has a possessory interest in mines as well as trees; and the copyholder of inheritance or for life, with power to renew or to nominate a successor, may also have a proprietary right in mines by immemorial custom; but

(20) 4 Ves. 703-7. And see *Attorney General* v. *Vincent*, Bunb. 192. *Lord Uxbridge* v. *Staveland*, 1 Ves. 56.

(21) 3 Meriv. 673. (9th April 1807). Reg. Lib. 1806. B. fo. 1224. But see *Attorney General* v. *Vincent*, and *Lord Uxbridge* v. *Staveland*, sup.

without such an established custom, the right of property in mines is in the lord: and it follows that, in the absence of any particular usage, neither the tenant without license from the lord, nor the lord without the consent of the tenant, can open and work new mines (22).

This rule was established about a century ago, by the case of *The Bishop of Winchester* v. *Knight* (23).

And in *Bourne* v. *Taylor* (24), Lord Ellenborough, C. J. in delivering the opinion of the court, gave his full sanction to the principle, holding, that trespass would lie against the lord for entering upon copyhold lands, to bore for and work mines and veins of coal, unless under a special custom: and his lordship, in support of that doctrine, cited the case of *Player* v. *Roberts* (25), in which the court held, that nei-

(22) When, in freehold cases, the whole inheritance is granted, even if mines and trees are expressly named, a person taking a particular interest only under the grant, cannot open mines or cut down trees. *Whitfield* v. *Bewit*, 2 P. W. 240. And although a lessee may dig mines when opened, being part of the profits, yet his opening new mines would be waste. *Saunders'* case, 5 Co. 12. Co. Litt. 53. b.

(23) 1 P. W. 406. But it would seem that a copyholder may dig for marl to lay on the land, Win. 8. Gilb. Ten. 327. As to royal mines, where the crown has only a bare reservation, see *Lyddal* v. *Weston*, 2 Atk. 19.

(24) 10 East, 189. So without shewing a custom, or special reservation, the lord could not claim a road-way over the lands of any of his tenants, to carry off the coals.

(25) W. Jones, 243. Co. Litt. s. 77.

ther the lord nor his lessee of mines could enter on the copyholder for life to dig coals, without being subject to an action of trespass by him (26); and also Gilbert's Tenures, 327, where the Lord Chief Baron says, "It seems to me that a copy- "holder of inheritance cannot, without a special "custom, dig for mines: *neither can the lord dig* "*in the copyholder's lands*, for the great prejudice "he would do to the copyhold estate;" and likewise *Townley* v. *Gibson & others* (27), where it had been urged in argument, that the lord of the manor was entitled to the mines under the copyholds, unless there were some custom to exclude him, and Buller, J. said, "I do not "agree with the defendant's counsel, that the lord "may, unless restrained by custom, dig for mines

(26) But the court there ruled, that when the lessor or lessee, or a stranger, enters and digs the coal out of the pits, it belongs to the lessee, and that if any other take the coal the lessee shall have trover.

(27) 2 T.R. 707. This case has established, that mines are clearly part of the demesnes of a manor, and not a distinct property from the freehold, and should therefore be reserved in express terms, when intended to be excepted out of the grant of waste, or the enfranchisement of copyholds, *ante*, p.24-5. But as mines may be a distinct possession from the manor, evidence of the possession of the manor will not avoid the statute of limitations in an ejectment by the lord for mines, where the defendant shews a possession of them for 20 years. *Rich* d. *Lord Cullen et al.* v. *Johnson et al.* 2 Stra. 1142. And see *Curtis* v. *Daniel*, 10 East, 273, which decided, that an adverse possession of *copper* mines by customary tenants for above 20 years, was evidence to establish a right against the lord of the manor, although he proved his right to all *tin* mines within the manor.

" on the copyholder's lands: but it is not neces-
" sary to consider that question here."

And Lord Ellenborough further observed, " If " such a right as is claimed exist, it is singular " that it is not noticed in any of the books which " treat of manors and copyholds; that it is now " for the first time brought forward; that not a " single instance is given of the exercise of it; " and that with the single exception of a dictum " in *Rutland* v. *Greene*, what authorities there are " upon the point are all against it. *Rutland* v. " *Greene* is in 1 Keb. 557. 1 Sid. 152. and 1 Lev. " 107. The case was this; a parson opened a " mine upon his glebe: the patron moved for a " prohibition to restrain him, under the equity of " the statute 35 Ed. 1. st. 2. The court thought " him entitled to open and work the mine, be- " cause, otherwise, none of the mines under " glebe lands throughout *England* would be " opened. But it being urged that this was the " only way the patron had to try his right, the " court granted a rule. *Siderfin* adds, the same " law seems of a copyholder of inheritance. *Quære* " *bien?* Whether this were his own conclusion, " or collected from what fell from the court, does " not appear: but if any inference is to be drawn " from it, it is, that the *copyholder* may open the " mine, not the *lord*. *Levinz* says nothing as to " lord or copyholder: but *Keble* says, ' *Twisden* " ' conceived the lord may open a mine in a co- " ' pyhold of inheritance.' *Foster* held it a tres-

parations to open a mine, as the question whether the lord could, without a special custom, open a mine, ought to be tried at law, and the assizes for the county of Northumberland being held only once a year, the trial could not take place before July; and Lord Erskine, Chancellor, asked if there was any case upon the point, whether the lord could without a special custom open a mine, observing, that the effect might be a disherison of the whole estate of the copyholder; and that even without an authority, he conceived the distinction between stopping the working of a mine already opened and opening, to be as it had been stated. And the court granted the injunction. In November, 1809, a motion was made to dissolve the injunction (32), and, after stating the purport of the bill, Lord Eldon, Chancellor, said, that in granting the injunction the court was influenced by the fact, that it had frequently interfered in the case of trespass by a local knowledge of the means of working coal mines, and that the exercise of the right in the mean time would change and deeply affect the property; and therefore it was proper that a trial should take place, but that great mischief might ensue to the lord of the manor by upholding the injunction too long;—that he had looked at the report of the case of *Bourne* & *Taylor* in the King's Bench, from which he collected, that the lord of

(32) 17 Ves. 281.

a manor may be in the same situation with respect to *mines* as to *trees;* that is, the property may be in him, but it did not follow that he could enter and take it without consent; which must be acquired by purchase or otherwise: and his lordship added, that it was understood both by Lord Erskine and himself, that the action which had been commenced would try the question; that if the merits had not been tried from the fault of the plaintiff in equity, that presented a strong case for dissolving the injunction; and that unless some means of procuring a speedy trial could be insured, he would dissolve it.

A copyholder who grants a lease of mines which is a forfeiture of his estate, has no equity against his lessee: So in *Wentworth* v. *Turner* (33), tenant for life made a lease of coal mines, and he and the remainder-man in fee joined in a bill for an injunction to restrain the defendant from taking coal, alledging that the lease was made by mistake, and was a forfeiture of the estate for life; but the Chancellor held, that a man should not disaffirm his own lease, observing, that if tenant for life, liable to waste, had sold timber, he could not prevent the vendee from cutting it: that it was collusion to bring forward the remainder-man, who, if he complained, must file a bill alone.

(33) 3 Ves. 3. It clearly appears, therefore, that a remainder-man may have an injunction to stay waste in copyhold as well as in freehold cases, *ante*, p. 482.

CHAP. XI.

ON FORFEITURE.

I SHALL now endeavour to shew by what acts a copyhold interest may be forfeited to the lord, and the distinction between absolute and conditional forfeitures.

Although copyholders are no longer dependent on the caprice of the lord of the manor, yet as they hold at his will *secundum consuetudinem manerii*, any act incompatible with the copyhold interest as established by custom, will operate as a forfeiture.

Therefore if a copyholder execute a feoffment with livery, (which would indeed not only create a common-law interest, but amount to a disseisin,) the lord may claim the estate as forfeited (1). And it has been said, that a copyholder levying a fine in the Court of Common Pleas, will forfeit his copyhold (2): but as a fine

(1) *Taverner* & *Cromwell's* case, 3 Leo. 109. S.C. 4 Co. 27. a. S. C. Cro. Eliz. 353. Co. Litt. 59. a. *Ib.* n. 3. *Brown's* case, 4 Co. 21. b. 2 D'Anv. 195-7. 1 New. Ab. 484. Kitch. 158. cites 11 H. 4. 81. And see 3 Mod. 151.

(2) Cru. on Fines, 281, pl. 387, cites Supp. Co. Cop. s. 11. And see Freem. 516-17. *Eastcourt* v. *Weeks*, 1 Salk. 187. S.C. Lutw. 503; 3 T.R. 166-7. In the case of *Wintle* & *Margaret* his wife, and *Washborne* et ux. v. *Carpenter* & *Pisburgh*, Fin. Rep. 462, the homage presented the estate as forfeited

would be void against the lord, even if grounded on a previous feoffment, unless, indeed, there had

by a fine being levied thereof at the common law; but the case is far from being an authority for any such effect of a fine of copyholds, as the following extract of it will shew. W. C. a copyholder in fee within a manor the court rolls whereof were lost, devised to his grandson R. C. who (3 Car. 1.) conveyed the lands as freehold to E. W. by deed and fine, who in like manner conveyed to T. and his heirs. T. commenced a suit against R. C. on the covenants between him and E. W., and at length it was agreed that R. C. should pay £30 to T., to be applied as a fine to the lord to admit T., and that R. C. should surrender at the next court; but before that time T. died, and his son, an infant, enjoyed the land 48 years, and then devised to the defendants in fee, to the exclusion of plaintiffs *Margaret* his sister, and *Washborne* his eldest sister's son, *(who probably were the testator's customary heirs)*. Afterwards a court was held at which the homage presented the forfeiture of the lands, *being sold as freehold by fine at common law*; and in consideration of a fine paid by the plaintiffs, the lords granted the lands to them and their heirs: The defendants dug up the boundaries, so that the copyhold could not be distinguished from freehold lands belonging to the defendants and others, and the plaintiffs therefore exhibited their bill to preserve the testimony of ancient witnesses, and for a commission to set out boundaries. The defendants in their answer denied the title of the plaintiffs under the lords of the manor, *for that the premises had been enjoyed as freehold for 60 years and more, and had during all that time passed by deed and fine.*

The plaintiffs replied, that since the bill exhibited they had obtained a verdict *on full evidence*, and judgment in ejectment, so that the defendant's title had become void both in law and equity. The court decreed a commission to set out and distinguish 60 acres of *copyhold lands*, and for that purpose witnesses to be examined, &c.

been an actual change of possession (3), I must suppose that it would not operate as a forfeiture. If, however, a fine be levied by a copyholder on a disseisin, without any collusion, it would clearly be a forfeiture, and against which no relief could be had in equity (4).

Again, if a copyholder without having previously obtained the lord's license, grant a lease

(3) *Fermor's* case, 3 Co. 77. *Margaret Podger's* case, 9 Co. 105. *Saffyn's* case, 5 Co. 124. a. Co. Cop. s. 55. Tr. 126. *Howlet* v. *Carpenter*, 3 Keb. 775. S.C. 1 Vent. 311. Cru. on Fines, 212. *Doe* d. *Tarrant* v. *Hellier*, 3 T.R. 162. *Ante*, pp. 84-5, 98.

In the above case of *Doe* & *Hellier*, Lord Kenyon evidently entertained considerable doubts as to the alledged effect of the fine, even if it could be held to extend to the copyholds; and, with reference to the dictum in the Supp. to Co. Cop., observed, that the Supplement was not Lord Coke's work, though from whose hands it came, he said, he did not know: and Buller J. observed 'that it did not follow because the deed to declare the uses of the fine comprehended a greater number of acres than the amount of the freehold estate, that the copyhold was included in the fine; and supposing it was, that the fine as to the lord was void, because the copyholder continued in possession: That the passage in the Supp. to Co. Cop. and the dictum of Treby C.J. in *Eastcourt* v. *Weeks*, was to be understood as applicable only to those cases where the fine destroyed the estate. That if there be a transmutation of possession either by a fine or feoffment, it divested the lord's right, because it gained a fee-simple to the person to whom it should be made or levied. But that was not so where the possession continued which was the principal case. That it was like the case of a mortgagor levying a fine, and continuing in possession, which was no bar to the mortgagee.'

(4) Sir *Harry Peachy* v. *Duke of Somerset*, Prec. Ch. 568. S.C. 2 Eq. Ca. Abr. 227.

not warranted by the custom (5), it will be an *immediate* forfeiture of his interest, even if it be a lease to commence at a future period (6); and, as it would seem, although the lessee does not enter (7).

A lease for one year excepting the last day, and so from year to year excepting the last day in every year, as long as the copyholder lives, operates as a lease for more than a year, and is a forfeiture (8).

And in *Mathews* v. *Whetton* (9), it was adjudged, that three separate leases for one year each, there being two days between the beginning of each of the new leases, and the end of the

S. C. 1 Stra. 451. *Lady Whetstone* v. *Sainsbury*, Prec. Ch. 591. S.C. 2 P.W. 147. And see 2 Vern. 537.

(5) *Murrel*'s case, 4 Co. 25. a. 1 Sho. 287. A few instances of leases, even 40 years back, will not establish a custom, *Jackman* v. *Hoddesdon*, Cro. Eliz. 351.

A lease for one year is warranted by the general custom of the realm, *Melwich*'s case, 4 Co. 26. *Turner* v. *Hodges*, Hutt. 101. S.C., Litt. Rep. 233. *Combes's* case, 9 Co. 75, b. *Jory* & *Pawly*, 2 Keb. 467. But this was formerly doubted, Co. Litt. 59. a. n. 4. Post. tit. 'Ejectment.'

(6) *Harding* v. *Turpin*, Het. 122. It should seem that a lease for years by *parol* is equally a cause of forfeiture. *Jackman* v. *Hoddesdon*, sup. *East* v. *Harding*, Cro. Eliz. 498-9. S.C. Mo. 392-3.

(7) *East* v. *Harding*, sup. Mo. 184-5, per *Anderson*. Co. Litt. 59. a. 2 D'Anv. 194-5. 1 New Ab. 484. And a Court of Equity will not relieve against the forfeiture. *Sir H. Peachy* v. *Duke of Somerset*, Prec. Ch. 568. S.C. 2 P.W. 147. S.C. 2 Eq. Ca. Abr. 227.

(8) *Luttrell* v. *Weston*, Cro. Jac. 308. S.C. Bulst. 215. Co. Litt. 59. a. n. 4.

(9) Cro. Car. 233. S.C. W. Jones, 249. 1 Roll. Abr. 508. pl. 10. Ib. 510. pl. 5.

former, was a device only to avoid the forfeiture, and that the entry of the lord's lessee, although the copyhold had been surrendered to the lord subsequent to the forfeiture, but without notice of it, was lawful.

But a lease to create a forfeiture must have a certain beginning and end, or it is void, and will convey at most an estate at will, which is no forfeiture.

So it has been held, that a lease for one year according to a custom, and a covenant for enjoyment *de anno in annum* during ten years, is not a demise for more than one year, and consequently no forfeiture (10).

In *Doe* d. *Nunn* v. *Lufkin and others* (11), the

(10) *Hamlen* v. *Hamlen*, 1 Bulst. 189. *Lady Montague's* case, Cro. Jac. 301. N. 4. Co. Litt. 59. a. 1 New. Ab. 484. *Lenthall and Wallup* v. *Thomas*, 2 Keb. 267. *Fenny* v. *Child*, and *Doe* v. *Morris*, infra; but see *Richards* v. *Sely*, 2 Mod. 79. S.C. *(Richards* v. *Ceely)* 3 Keb. 638. So a lease for lives without livery, is no forfeiture, Godb. 269. pl. 374. Gilb. Ten. 234-5.

(11) 4 East, 221. S. C. 1 Smith, 90. The lord having in this case purchased the interest of the tenant with notice of the demise, a bill was filed for an injunction, but no motion being made the ejectment proceeded. Upon a motion afterwards for an injunction, the Chancellor ordered a case for the opinion of the Court of C.B. whether an ejectment would lie before the expiration of 14 years, from the commencement of the lease, and if it would, and the tenant should be ousted, whether any action could be maintained on the covenant for quiet enjoyment. And the Judges of that court certified, that an ejectment would lie before the expiration of the term; and that if the tenant should be thereby evicted, no action could be maintained on

Court of King's Bench decided, that a demise for one year, and so from year to year for 13 years more, *if the lord would give license and so as the same should not be a forfeiture*, made the license a condition precedent, and was not therefore a lease to create a forfeiture.

And a demise of a copyhold for three years, with a covenant to execute a new lease for three years, within three months next before the expiration of the term, and so *toties quoties* to make up a term of 21 years, with a covenant for quiet enjoyment until such new leases should be executed, has been held not to amount to a lease for more than three years (12).

And again, in *Doe* d. *Wood* v. *Morris* (13), the

the covenant. And Lord Eldon, C. being of opinion that there was not equity enough to sustain the bill, it was dismissed. *Vide Lufkin* v. *Nunn*, 11 Ves. 170. *Luffkin and others* v. *Nunn and Hanson*, 1 N.R. 163.

(12) *Fenny* d. *Eastham* v. *Child*, 2 Mau. & Sel. 255. But a lease for three years, and so from three years to three years until nine years, would operate as a lease for at least six years, see *Wilcock's* case, 2 D'Anv. 195. pl. 9. Vide also *Lady Montague's* case, Cro. Jac. 301. 1 Bulst. 180.

(13) 2 Taunt. 52. And see *Doe* d. *Coore* v. *Clare*, 2 T.R. 739, where by an instrument on an agreement stamp, it was recited that A., in case he should be intitled to certain copyhold premises on the death of B., had agreed immediately after the decease of B., to demise the same to C. on the terms thereinafter mentioned; and then it proceeded, "Now there- "fore the said A. doth hereby "agree to demise, &c. to hold, "&c. from and immediately "after the death of B. for "21 years"; And A. further agreed on the death of B. to

Court of Common Pleas admitted that an agreement to lease a copyhold for 21 years, if the license of the lord could be obtained, did not amount to a lease for a longer time than a year: In this case the court held, that if a copyholder undertakes to obtain a license for his lessee to do an act which would be waste; as, for instance, to dig fullers-earth, on condition that the lessee should fill up the holes again, an ejectment will not lie by the copyholder or his assignee as for a forfeiture, although the lessee does not comply with the condition.

A copyholder who has leased with license may forfeit his interest in reversion or remainder, a reversioner or vested remainder-man being in the seizin equally with a tenant in possession (14); but such forfeiture will not affect the lease (15).

The crimes of treason (16) and felony, are also causes of forfeiture to the lord, (even without a custom,) immediately on the attainder, as the copyholder is then considered as dead in law (17);

procure a license from the lord: the agreement was held to be executory and not to operate as a forfeiture, though Lord Kenyon at the trial was of opinion that the instrument amounted to a lease.

(14) *Ante*, p. 150. And see 1 Vol. Watk. on Cop. 336.

(15) *Turner* v. *Hodges*, Hut. 101-2. S.C. Litt. Rep. 233. Gilb. Ten. N. 153. 8. Co. 45. a. *Swinnerton* v. *Miller*, Hob. 177. 6 Vin. Cop. (N. e.) pl. 5.

(16) It has been said that if the tenant be attainted of high treason, the King shall have the escheat, of whomsoever he held. Scroggs, 168. But see ante, p. 97.

(17) *Lord Cornwallis's* case, 2 Vent. 38-9. *Benison* v. *Strode*,

and it is only by express words in a statute that the king, and not the lord, is to have the copyholds of a person attainted (18).

But a copyhold is not forfeited by a conviction of felony without attainder, except indeed by special custom. This was fully decided by the Court of B. R. in the late case of the *King* v. *Sir Francis Willes* (19), in analogy to the rule that

Skin. 8, 29. S.C. 3 Lev. 94. S.C. 2 Sho. 150. S.C. Pollexf. 617. S.C. T. Jones, 189. *Roe* d. *Jefferys* v. *Hicks*, 2 Wils. 13. Co. Cop. s. 59. Tr. 137. 1 New. Abr. 486. Gilb. Ten. 241. 2 Hawk. Pl. C. c. 49. s. 7. Kitch. 161. 1 Vol. Watk. on Cop. 325. And see *Gittings* v. *Cooper*, 1 Bulst. 13. 2 Brownl. 217. *Paginton* & *Huet*, Godb. 267, which seems to be S.C. *Jory* v. *Pawly*, 2 Keb. 451, 466. S.C. 1 Lev. 263. *Harris* v. *Jay*, 4 Co. 30.

(18) *Lord Cornwallis's* case, 2 Vent. 38-9. *Heydon's* case, 3 Co. 8. a. but see *Saliard* & *Everat's* case, 1 Leo. 97. *Ante*, (n. 16).

(19) 3 Barnew. & Ald. 510. [26 Apr. 1820]. And see *Lord Cornwallis's* case, and *Paginton* v. *Huet*, sup. Com. Dig. Cop. (M. 1.) 2 Hawk. P. C. c. 49. s. 7.

In the above case of the *King* v. *Willes*, which arose out of a mandamus to admit the surrenderee of A. B. to certain copyhold tenements held of the manor of Biggleswade in Bedfordshire, it appeared that A. B., previously to his making the surrender, had been guilty of the offence of receiving stolen goods, and was subsequently to the surrender tried and convicted under the stat. of 5 Ann, c. 21, by which it was enacted, that such offender should suffer death as a felon convict, but the benefit of clergy was not taken away; and by 4 Geo. 1. c. 11. s. 1. he may be transported for 14 years; the judgment of the Court of Sessions was, that the prisoner should be transported for 14 years: N.B. It did not appear that he prayed the benefit of clergy, nor was there any special custom within the manor respecting forfeitures for felony.

there can be no forfeiture of freehold for a capital crime without attainder (20).

But pardon after attainder is not a dispensation of the forfeiture (21), for as Mr. Watkins justly observes (22), the pardon necessarily confesses the guilt which was the cause of forfeiture, and the King cannot remit the claims of the lord.

Although no advantage can be taken of a forfeiture for treason until attainder, yet after attainder it has relation to the treasonable act, and the law, I apprehend, is the same in the case of felony (23); but in some manors corruption of blood does not take place (24).

If there be a custom to seize for a capital crime before the conviction is recorded (25), the

(20) *Steven's* case, Cro. Car. 566.

(21) *Benison* v. *Strode*, ante, n. 17.

(22) 1 Vol. on Cop. 348-9.

(23) *Lord Cornwallis's* case, 2 Vent. 38-9. But a felon has a property in goods until conviction, and therefore an assignment of his property for a valuable consideration, on the eve of his trial, will be supported, though a voluntary disposition would be deemed fraudulent. *Shaw* v. *Bran*, 1 Stark. 319. And see *Jones* & *Ashurt*, Skin. 357.

(24) 2 Vol. Watk. on Cop. 326, cites Robins. Gav. b. 2. c. 4; and see Append. [2d Ed.] Watk. on Cop. No. 1. Customs of Dymock.

(25) See *Borneford* v. *Packington*, 1 Leo. 1, where there was a custom for the lord to seize on presentment of a conviction for felony, and the heir convicted in the lifetime of his mother, who was admitted to her freebench, was held to have forfeited his estate. See also 2 Hawk. P. C. c. 49. s. 7. Lex Cust 48. cites *Gittings* & *Cooper*, ubi sup.

Should the heir of a copyholder commit treason or felony in the lifetime of his ancestor, and be attainted, then as he is

forfeiture will be purged by acquittal (26), but not, I apprehend, by the allowance of clergy after conviction (27); yet when there is no such custom, the forfeiture it should seem will be discharged, by the allowance of clergy before attainder (28).

It has been said, that outlawry is also a cause of forfeiture of copyholds (29); but Chief Baron Gilbert in his treatise of tenures [p. 242], makes a *quære* whether a copyholder forfeits any thing

considered to be dead in law, I apprehend that the copyhold would escheat to the lord on the death of the father, if such heir had issue inheritable, as they could only claim through him, but if he had no issue, inheritable, it should seem that the estate would descend to the person who would be heir to the father, if the person attainted were dead without issue inheritable. ' Anon. Dy. 48. a. pl. 16. 1 Hale's P. C. 356-7. 3 Co. 10. b. Vin. Abr. tit. ' Escheat,' Ib. ' Blood corrupted.'

(26) *Gittings & Cooper, Paginton & Huet, Jory & Pawly*, ante, n. 17.

(27) *Jory & Pawy*, sup. 2 Hawk. P. C. c. 33. s. 129.

(28) *Jory & Pawly*, sup. According to Lord Hale, the effect of the benefit of clergy is, that presently upon the burning in the hand, the party is to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. 2 Hale, P. C. 389. And see 5 Co. 110. b. 4 Bl. Com. 374.

(29) See Co. Cop. s. 58. Tr. 135, where Lord Coke says, that if a copyholder be outlawed or excommunicated, that the lord may have the profits of his copyhold land, a presentment is necessary.

It is said in Lex Cust. 210, that a copyhold is not forfeited by outlawry in a personal action, the lord not being prejudiced by it, and yet that the King shall have the profits. And see 1 Leo. 99. pl. 126.

in outlawry unless for a capital crime; and this would seem to be a correct distinction (30).

Waste, either *voluntary* or *permissive*, is also a cause of forfeiture of copyholds (31): Of the former character are the acts of pulling down houses (32), or cutting down trees, or digging for

(30) *Vide* Kitch. 242-3. Gilb. Ten. 328. *The King* v. *Budd*, Parker's Rep. 190. 2 D'Anv. 200. (G.) marg. *Turner* v. *Hodges*, Litt. Rep. 234, where it is stated argo. to have been adjudged in 44 Eliz. that a copyhold is not determined or forfeited by outlawry. And see Hetl. 127. 2 Keb. 467, in *Jory* & *Pawly*.

(31) Co. Cop. s. 57. Tr. 134. Co. Litt. 63. a. *Ib.* N. 1 & 2. *Clifton* & *Molineux*, 4 Co. 27. Gilb. Ten. 235. *Downingham's* case, Ow. 17, 18. *Eastcourt* v. *Weeks*, 1 Salk. 186. S.C. Lutw. 803. *Attorney Gen.* & *Vincent*, 2 Eq. Ca. Ab. 378. pl. 9. Bunb. 192. But it is sometimes punished only by fine. Customs of Yetminster Prima. 2 Watk. on Cop. App. No. 2.

It was said by Anderson and Walmsley in *Farmer* & *Ward*, Noy 51, that negligent waste is not a cause of forfeiture without a special custom. And see 5 Co. 13. b. in the *Countess of Shrewsbury's* case. 2 Keb. 467, in *Jory* & *Pawly*. Sed Vide *Downingham's* case, and *Eastcourt* v. *Weeks*, sup. Co. Litt. 63. a. (n. 1).

It is supposed that if a surrenderee in possession commit waste, it is not a cause of forfeiture of the interest he acquires by a subsequent admittance, but that the surrenderor would be answerable; *Vide* Mo. 49. pl. 149. 1 Watk. on Cop. 101. (n. o.) Gilb. Ten. 235: at all events the admission of a surrenderee after waste, would be a dispensation of the act.

(32) It would seem that a copyholder may build a new house without licence, but that if he pulls it down again after it is covered in, it will be a forfeiture. *Cecil* & *Cave*, 1 Roll. Abr. 507. Cop. D. pl. 6. *Brock* v. *Bear*, 1 Bulst. 50. 2 D'Anv. 194. Gilb. Ten. 235, but see the cases referred to, Ib. n. (c).

In *Hardy* v. *Reeves*, 4 Ves.

mines, when not warranted by the custom (33); in short, any active offence whereby the copyhold estate is deteriorated: Of the latter character are the neglect of reparation of buildings, or of banks or mounds, or of the ordinary rules of cultivation of land, whereby the property may become useless or unprofitable (34).

There are also various other causes of forfeiture of copyhold estates; as if a copyholder neglect to attend a court after being summoned (35), (but it would seem that the summons must be personal, and that a general summons at the church is not sufficient) (36), or should refuse to

466, the Master of the Rolls said, "A mortgagee of a copyhold may pull down ruinous houses and build much better. The lord has a right to say that the tenant should not let the houses fall, and might seize if he did."

Erecting a mill on a copyhold is said to be a cause of forfeiture. By Doderidge, Lat. 123, in *Gray* & *Ulisses*. Dy. 211. b. pl. 13. marg. Contra if set upon posts. *Ward's* case, 4 Leo. 241.

(33) *Brock* v. *Bear*, ante, n. 32. *Rastal* v. *Turner*, Cro. Eliz. 598. Co. Cop. s. 57. Tr. 134. *Ante*, tit. "Trees & Mines."

(34) Co. Cop. s. 57. Tr. 134-5. Kitch. 114. *Paston* & *Utbert*, Litt. Rep. 264. S.C. Hut. 102. S.C. (*Paston* & *Mann*). Het. 5. *Pool* v. *Archer*, Skin. 211. Palm. 417. Lat. 277. 1 Watk. on Cop. 332.

Manuring of land to hop ground, or converting arable land into a pischary, is said to be a cause of forfeiture, *Paston* & *Utbert*, sup. Lex Cust. 211. 1 Watk. on Cop. 332.

(35) Co. Cop. s. 57. Tr. 131. *Hammond* v. *Wemybank*, 3 Bulst. 268. S.C. (*Buttevant* v. *Pickstaffe*) 1 Roll. Rep. 429. Lex Man. 86. But illness or imprisonment, or the fear of arrest, is a good excuse, Co. Cop. s. 57. Tr. 131. Kitch. 244. 1 New Abr. 483.

(36) *Taverner* v. *Cromwell*, Cro. Eliz. 353. S.C. 3 Leo. 107.

be sworn of the homage, or being sworn, should refuse to present the articles according to his oath (37); or if a copyholder disclaimeth his lord (38); or refuse to pay the fine, when certain or reasonable (39), or the customary rent, when *demanded* (40); or *wilfully* withholds the services (41); or sues a replevin upon the lord's

S. C. 4 Co. 27. Co. Ent. 288. *Sir Chr. Hatton's* case, [or *Farrer & Woodhouse*] cited in *Crisp* v. *Fryer*, Cro. Eliz. 505; Mo. 350; Noy, 58; cited also 3 Leo. 109, in *Taverner & Cromwell*. 1 Roll. Abr. 507. 1 New. Abr. 483. 2 D'Anv. 193. pl. 7, 8. *Belfield* v. *Adams*, 3 Bulst. 80. S. C. (*Southcott* v. *Adams*), 1 Roll. Rep. 256. Godb. 142. pl. 176. (cites *Lord Dacre's & Harleston's* case). Gilb. Ten. 229. *Ante*, p. 416; but see *Sir John Braunche's* case, 1 Leo. 104.

(37) Co. Cop. s. 57. Tr. 131. Gilb. Ten. 231. *Southwell & Thurston*, cited in *Taverner & Cromwell*, sup. *Crisp* v. *Fryer*, sup. After note made to present, (C) pl. 1. 2 D'Anv. 192.

(38) Co. Cop. s. 57. Tr. 132. Kitch. 245.

(39) Co. Cop. s. 57. Tr. 132-3. *Fish & Rogers*, 2 D'Anv. 191-4. S. C. 6 Vin. Cop. (P. c.) pl. 1. *Trotter* v. *Blake*, 2 Mod. 229, *Wheeler* v. *Honour*, T. Ray. 41. *Allen* v. *Abraham*, 2 Bulst. 32. *Fanshaw & Bond*, Sty. 387. *Sand's* case, cited in *Hobard & Hammond*, 4 Co. 27-8. *Ante*, p. 406.

(40) Co. Cop. s. 57. Tr. 133-4.; but it must be a wilful refusal. *Barnes* v. *Corke*, 3 Lev. 308. *Williams's* case, cited Latch. 122, in *Grey & Ulisses*, which seems to be the same case as cited in Godb. 143, and there called *Winter's* case; 1 New Abr. 483-4. *Beconshaw & Southcote*, cited in *Fraunces's* case, 8 Co. 92. a. And therefore the demand, both for rent and fine, should be of the person of the tenant, *Denny* v. *Lemman*, Hob. 135. *Trotter* v. *Blake*, sup. 2 D'Anv. 192. pl. 3. *Ante*, p. 407.

Whether negligence for several years may amount to a wilful denial. See *Crisp* v. *Fryer*, sup. and compare with *Belfield* v. *Adams* or *Southcott & Adams*, sup. Lex Man. 86-7. Goldsb. 143, pl. 59.

(41) Gilb. Ten. 229. *Buttevant* v. *Pickstaffe*, 1 Roll.

lawful distress for rent or services (42); or (as it has been said) shall inclose where it was never inclosed before, or shall remove or abate an ancient inclosure or land mark (43); or shall forge a customary to the injury of the lord (44); or if a copyholder for life suffer a recovery by plaint in the lord's court as a copyholder of inheritance (45);

Rep. 429. S.C. (*Hammond* v. *Wemybank*), 3 Bulst. 268. *Belfield* v. *Adams* or *Southcott* v. *Adams*, ubi sup. And see *Rivet* v. *Dowe*, 2 Brownl. 279. *Noy*, 135. Kitch. 176. But a copyholder saying he would come if the lord had a court, otherwise not, is not a wilful refusal of services, though the lord might seize *quousque*. *Corke* v. *Lees* cited in *Lord Salisbury's* case, (or *Pateson* v. *Danges*), 1 Keb. 287.; and see *Parker* v. *Cook*, Sty. 241. Vide also *Johnson's* case, Lat. 14. *Barnham* v. *Higgins*, *Vernon* & *Huggins*, P. 26 Eliz. Ib. 14, 123. *Grey* & *Ulisses*, Ib. 122. Dy. 211. marg. Lex Man. 87. Hinderance by sickness, or the like, is no forfeiture. *Ante*, n. 35.

(42) Co. Cop. s. 57. Tr. 133. Lex. Cust. 210.

(43) Gilb. Ten. 327. 1 Watk. on Cop. 333.; but see Sir *Harry Peachy* v. *The Duke of Somerset*, 1 Stra. 454. *Paston* & *Utbert's* case, Litt. Rep. 264. S.C. Hut. 102. S.C. (*Paston* & *Mann*), Het. 5. Win. 8. Or if a copyholder deface doal marks. Litt. Rep. 268 Lex. Cust. 209. Gilb. Ten. 243. But a bare inclosure, I apprehend, would not be a cause of forfeiture. See Lex. Cust. 210, cites Het. 7, 8; particularly if the land be improved by it, *Paston* & *Utbert*, ubi sup.

(44) *Taverner* & *Cromwell's* case, ubi sup. Dyer, 322. b. *Vide* stat. 5 Eliz. c. 14, against forgery of deeds and writings, post Appendix. Co. Cop. s. 52. Tr. 121. And by Lord Coke, "If the "steward sheweth a court roll "to a copyholder to prove that "his land is holden by copy, "and the copyholder saith he "is a freeholder, and sheweth "a deed, pretending thereby to "procure his land to be free-"hold, and teareth in pieces "the court roll, this is a for-"feiture *ipso facto*." Cop. s. 57. Tr. 132.

(45) Co. Cop. s. 57. Tr. 134.

but in *Kerby alias Kirk's* case (46), it was doubted whether a recovery by a copyholder for life should operate as a forfeiture, the lord being a party to every recovery suffered in his court.

It must be recollected, that when the customary heir, or the surrenderee if compellable to take admission, neglects to come in and be admitted, the lord can only seize *quousque, except by special custom;* and that even a custom for a copyhold to be forfeited for non-appearance after three proclamations, shall not extend to a person beyond sea, or being under any disability, as infancy or coverture; and also that infants and femes-covert are especially protected against forfeiture for non-admittance, or for neglect or refusal to pay a fine, by the statute of 9 Geo. 1. c. 29. (47).

A forfeiture of copyholds does not extend beyond the estate or interest of the person offending; so that if a tenant for life commit a forfeiture, it shall not affect the interest of a remainderman, whether vested or *contingent*, or of the reversioner, unless perhaps by special custom (48).

(46) 1 Freem. 192. S. C. (called *Bird* & *Kirke,*) 1 Mod. 199. S. C. (called *Keen* v. *Kirby,*) 2 Mod. 32. S. C. (called *Bird* v. *Kirkby,*) Carter, 237.; and see Gilb. Ten. 235. *ib.* n. 102. Lex. Cust. 206. 6 Vin. Cop. (I. c.) pl. 9. marg.

(47) *Ante,* pp. 30, 345: And see *Copley's* case, Hil. 7. Jac. C. B. cited Supp. to Co. Cop. s. 19 Tr. 206. 17 Ves. 90, in *Beckford* v. *Wade.*

(48) Co. Cop. s. 59. Tr. 138. Gilb. Ten. 245-6. *Podger's* case, 9 Co. 107. a. Carter, 238.

Again, the forfeiture of one of several joint-tenants will extend to his own part only (49).

And the forfeiture of one copyhold tenement is not a cause of forfeiture of any other held under the same copy, but which was originally held separately, for they continue distinct copyholds (50).

A release grounded on a bargain and sale for a year, and a bargain and sale inrolled, passing only the interest which the releasor or bargainor may lawfully transfer, and being therefore inoperative as to copyholds, will not create a forfeiture (51), any more than a feoffment without livery (52).

Baspole & *Long*, Yelv. 1. S. C. Cro. Eliz. 879. S. C. Noy, 42. Sir T. Raym. 404. 1 Roll. Abr. 568. (G.) pl. 5. *Rastal* v. *Turner*, Cro. Eliz. 598. *Redsal* v. *Lacon*, cited ib. 880, and seems to be S. C. *Rastal* v. *Lane*, cited Noy, 42, which seems also to be S. C. 6 Vin. Cop. (S. c.) pl. 1. & 7. And see 1 Roll. Abr. 509. F. *Ante*, pp. 348, 455. et seq.

(49) Co. Cop. s. 59. Tr. 138. Ritch. 160-1.

(50) Co. Cop. s. 59. Tr. 138. Gilb. Ten. 246-7. *Taverner* v. *Cromwell*, ubi sup. *Hobart* & *Hammond*, 4 Co. 27. b. 28. a. *Dalton* v. *Hamond*, Cro. Eliz. 779. S. C. Mo. 622. But an act of forfeiture as to part, will be a forfeiture of the whole of the tenements held under the same copy. *Taverner* v. *Cromwell*, sup. *Pascal* v. *Wood*, 3 Keb. 641. 1 New. Abr. 486-7. 1 Watk. on Cop. 335-6.; but see *contra*, except as to waste, *Fuller* v. *Terry*, 41 Eliz. 1 Roll. Abr. 509. (E). *Contra* also even as to waste, where there is no building, Gilb. Ten. 247.

(51) *London's* case, Godb. 269. pl. 374. Gilb. Ten. 255. 1 Watk. on Cop. 327-8. Roper's Baron & Feme. 1 Vol. 82-3. But see Co. Cop. s. 58. Tr. 135-6. 1 Roll. Abr. 508. Cop. D. pl. 11.

(52) 3 Leo. 109, in *Taverner*

It has been said that a feoffment with letter of attorney to make livery, is a forfeiture, though no livery be made, but that without such letter of attorney it would not be a forfeiture, as it would be in the breast of the copyholder whether he would perfect it or not (53). But I apprehend that even with such a letter of attorney, it is no forfeiture till livery be actually made (54).

As a surrender is in its nature similar to a release or bargain and sale (55), so if a copyholder for life surrender to the use of another in fee, it will not be a forfeiture of his interest (56).

It should seem that a forfeiture can only arise by the act of the tenant, and that if therefore a disseisor, or a surrenderee before admittance (57), or a *cestui que trust* (58), or a guardian, or a stranger without assent of the copyholder, (or even with the assent of the copyholder if a feme covert,) commit waste, it is no forfeiture (59).

v. *Cromwell*, 1 New. Abr. 484. 2 D'Anv. 195, pl. 12, 13. Lex. Man. 95. Godb. 269, pl. 374.

(53) 1 Roll. Abr. 508. Cop. D. pl. 12, 13.

(54) Co. Litt. 59. a. (n. 3.) 1 Watk. on Cop. 327.

(55) *Ante*, p. 165.

(56) *Fenton & Colston*, cited 4 Co. 23. a. Co. Cop. s. 57. Tr. 76. Carter, 238, in *Bird & Kirkby*, *Oldnot* v. *Lovell*, Mo. 753.

(57) Co. Cop. s. 59. Tr. 138. *Roe* d. *Jefferys et al.* v. *Hicks et al.*, 2 Wils. 13. *Ante*, p. 161-2.

(58) Co. Cop. s. 59. Tr. 137. *Sir H. Peachy* v. *Duke of Somerset*, 1 Stra. 454. S. C. Pre. Ch. 573. Cestui que Trust committing felony, Ib., and see Cary, 14, 15. *Ante*, p. 463. (n. 27).

(59) Co. Cop. s. 59. Tr. 137. Kitch. 161. *Clifton & Molineux*, 4 Co. 27. a. Gilb. Ten. 235-6. 4 Leo. 241. ca. 381.

But it would appear that the copyholder, even if a trustee (60), is answerable for waste in all cases, except it be occasioned by the act of God (61): And that the lord may take advantage of a forfeiture by a person who has been wrongfully admitted, and to whom the rightful tenant released after the forfeiture (62); or of a forfeiture committed by a wife with the consent of her husband (63).

A guardian committing waste is not a forfeiture of the copyhold, but he shall forfeit the wardship (64).

Neither a feme covert of herself without the assent of her husband, unless indeed for treason or felony (65), nor an infant under the age of fourteen (being till then in ward,) nor a person *non sanæ memoriæ*, an ideot or lunatic, can forfeit a copyhold (66).

(60) 1 Stra. 454, Pre. Ch. 573, in Sir *H. Peachy* v. *Duke of Somerset.*

(61) Mo. 49. pl. 149. Com. Dig. Cop. (M. 3.) *Rook* v. *Warth*, 1 Ves. 462. Belt's Supp. 200. But a court of equity would relieve against a forfeiture by waste, committed without the direction or privity of the copyholder. N. 2. Co. Litt. 63. a. *Taylor* v. *Hoae*, cited Toth. 237-8. 6 Vin. Cop. (E. d.) pl. 2. And see *Litton's* case, Cary. 8. *Dalton* v. *Gill* & *Pindor*, Ib. 90. 2 Atk. 189.

(62) 2 Watk. on Cop. 337. N. 108, Gilb. Ten.; but see Gilb. Ten. 248-9. *Odingsal* v. *Jackson*, 1 Brownl. 149. Lex Cust. 217, 218.

(63) Co. Cop. s. 39. Tr. 137.

(64) *Ib. Ante*, p. 450.

(65) 4 Bl. Com. 29. 2 Watk. on Cop. 338; cites also 1 Hawk. P.C. c. 1. s. 11.

(66) Co. Cop. s. 59. Tr. 156-7. No forfeiture can be incurred by infants or femes covert for refusing to be admitted, or to pay the lord's fine, 9 Geo. 1. c. 29. s. 5. *Ante*, pp. 344-5.

refusing to be sworn on the homage, or to present the articles according to the oath administered to the homage—disclaiming the lord,—denying to pay rent or a fine certain, on demand, or a reasonable fine within a convenient time after the assessment,—suing a replevin on the lord's lawful distress,—or committing waste voluntary or permissive.

The offences and causes of forfeiture, of which by common presumption the lord cannot of himself have notice, Lord Coke states (75) to be,—felony or treason; outlawry or excommunication; going about in any other court to intitle any other lord to the copyhold; and alienation by bargain and sale *inrolled*, or by feoffment *with livery*; and these and the like, he says, ought to be presented.

Mr. Watkins upon this question thus expresses himself (76), "In many cases the lord may enter "immediately into the lands without the interven"tion of a presentment of the forfeiture; in "others a regular presentment is previously re"quisite, or, at least, advisable. Where the "offence which is the cause of forfeiture is, in "its very nature, apparent and notorious, and "such as by common presumption the lord "cannot avoid noticing, no presentment can "be necessary, as a presentment is only for his "instruction."

(75) Co. Cop. s. 58. Tr. 125. (76) 1 Vol. 366: but see *post*, n. (77).

"If a person, therefore, be attainted of treason "or felony, the lord may seize without any pre- "sentment by the homage; since the commis- "sion of the offence is ascertained and made of "publicity by his conviction in a court of law. "So if the forfeiture be in consequence of any "act or refusal in the presence of the lord, as in "open court, no presentment can be requisite; "as the end of presentment is already answered. "Thus if proclamation be made for an heir to "claim, and no claim be made: if a copyholder "be personally warned to do suit at a particular "court, and he does it not; or if he appear in "court and openly and absolutely refuse to be "sworn on the homage, according to the custom, "or the like, a presentment must be evidently "nugatory.

"But when the cause of forfeiture is such that "by common presumption the lord cannot have "notice, a presentment should be made to ap- "prise and inform him of it: however, it does "not appear that, even in this case, it is any "ways of necessity. A presentment is, as we "have seen, only the mean of information as to "the lord: if the circumstance be already known "to him, any further mean of instruction must "be needless. If he, therefore, is aware of the "event of which a forfeiture would be the con- "sequence, he may avail himself of it without a "presentment. Still, however, it is prudent and "advisable to present such event in open court,

"that the matter may be apparent to others; "and for the satisfaction of the remaining te- "nants, as well as a sanction to the lord."

I would submit that no presentment can be requisite, in any case, in order to enable the lord to take advantage of a forfeiture, but that the several acts I have enumerated are forfeitures of the copyholder's interest, *ipso facto*, intitling the lord, if he please, to enter for the offence, *as a determination of his will* (77); but where the

(77) It was expressly held in *Benison* v. *Strode*, T. Jones, 190, that by the attainder, the copyhold estate for life was absolutely determined, and that no presentment was necessary, for that the presentment was only for the instruction of the lord, and that he might enter before any presentment. And in *East* v. *Harding*, Cro. Eliz. 499, where the estate was forfeited by the grant of a lease not warranted by the custom, the court ruled that the presentment was not of necessity, and that the lord might take advantage of it before the presentment. And see 3 Salk. 100, where it is said, that the lord may grant forfeited copyholds without seisure, the forfeiture being a determination of the will of the party, and the lord is in as of his reversion: For which see *Milfax* v. *Baker*, 1 Lev. 26. Vide also *Benson* & *Strode*, 2 Sho. 152. But see Gilb. Ten. 247-8.

Chief Baron Gilbert, in noticing the *dictum* of Lord Coke, that a presentment is necessary in those cases of forfeiture where the lord cannot be presumed to have notice, says, "And indeed the reason "given by *Coke* is of no co- "gency, that because the lord "cannot by intendment have "notice of them himself, that "therefore he shall take no "advantage of them without "presentment; for if he can "take notice of them, why "should he not, since present- "ment is not that which gives "title, but only lets him know "what he hath a title to? But

cause of forfeiture is not by any act in court, so that the lord cannot be presumed to have notice of it, it is certainly the duty of the homage, if apprised of the offence, to present it for the information and instruction of the lord.

It is essential, however, to establish the fact upon which the seizure is made, by the clearest possible proof (78).

Of the Persons who may take advantage of Forfeitures.

If a tenant for life commit a forfeiture, the lord shall take advantage of it, and not the remainderman (79), unless, indeed, the estate of the re-

" however it is safe to get such " things presented; and if there " be a custom for it, it must " be pursued." Ten. 246.

(78) *Hamlen* v. *Hamlen*, 1 Bulst. 189. Neither the presentment of forfeiture, nor the entry or seizure of the lord need be proved. *Bishop Winton* v. *Mills*. Per Tracy. Surry 1707. Vide Ballantine's Ed. Runn. on Ejectm. 392. See also Bull, N. P. 107. Neither is it necessary to prove the proclamations, on a seizure quousque for non-admittance. *Doe* & *Jenney*, 5 East, 522. Contra, when there is a custom to seize as forfeited. *Salisbury's* case, Keb. 287, 1 Lev. 68. 12 Vin. Abr. 105. *Ante*, p. 243.

Mr. Watkins in his 2d Ed. on Cop. (Vol. 1, p. 347, n. t.) has raised a question, whether if the lord need not prove seizure, a suit to set out boundaries may not be often dispensed with, by bringing ejectment, and on a writ of execution being awarded, the sheriff to summon a jury to ascertain the property, as on a fieri facias.

(79) *Margaret Podger's* case, 9 Co. 107. a. 1 Saund. 161. *Head* v. *Tyler*, Holt, 161. S. C. 12 Mod. 193. *Bird* &

mainder-man fall into possession on the forfeiture happening, as if the limitation be to A. for life, and after the death, *forfeiture* or other determination of the estate of A. to B., and A. commit a forfeiture, then the estate of B. would take effect in possession (80); but I have already observed, that this can only happen by the lord's consenting to accept a surrender so framed as to be a dispensation of his right of entry for a forfeiture, in favour of the remainder-man.

And it has been determined, that if the tenant for life commit *waste*, the lord may enter, even if there be a grant in remainder expectant on the death *or forfeiture* of such tenant for life (81).

The lord *pro tempore*, whether in fee, or for life or years only (82), may take advantage of a forfeiture.

Kirke, ante, (n. 46). *Smartle* v. *Penhallow*, 2 Lord Raym. 1000. S. C. 1 Salk. 189. S. C. 6 Mod. 67.; but see *Beneson* v. *Strode*, Skin. 8, 29. S. C. Pollexf. 619. S. C. T. Jones, 189. S. C. 2 Sho. 150. S. C. *(Strode* v. *Dennison)*, 3 Lev. 94.

(80) *Beneson* & *Strode*, sup.

(81) *Doe* d. *Folkes and the Dean and Chapter of Exeter* v. *Clements*, 2 Mau. & Sel. 68. In this case the Court of K. B. in confirming the verdict at the trial before Mr. B. Graham, at the assizes for Devon, said, that waste was an injury to the lord for which ejectment would lie at his suit; for if it were otherwise, the tenant for life and remainder-man, by combining together, might strip the inheritance of all the timber.

(82) *Meeres* & *Ridout*, Godb. 175. 1 Roll. Abr. 858. pl. 13. Ib. 509. Cop. (G). pl. 2. Com. Dig. Cop. (M. 6). 6 Vin. Cop. (T. c.) pl. 2, cites *East* & *Harding*, Cro. Eliz. 498; (S. C. Mo. 392. S. C. Ow. 63,) and *Rowles* & *Mason*, Tr. 10. Jac. *ubi sup.* 1 New. Abr. 488. (8). 2 D'Anv. 198-9.

And so may the feoffee of a single copyhold, notwithstanding the severance, or even his lessee (83).

But as copyholds are within the statutes of limitation, it would seem that the lord cannot enter for a forfeiture after twenty years (84).

In case of a forfeiture in the lifetime of the tenant for life, it has been said, that the lord in remainder may take advantage of it when his estate comes into possession, (even if the tenant for life had aliened to another,) as he had an interest in the manor at the time of the forfeiture (85): and as the acts of a tenant for life, whether he be the lord or copyholder, ought not to prejudice the remainder-man, this would appear to be reasonable when the act of forfeiture destroys the estate, as where a copyholder executes a feoffment with livery; but the law is otherwise, I apprehend, when the act is not a disherison, as in the case of waste, or of a lease without license (86).

(83) *East* v. *Harding*, ante, p. 516. Cro. Car. 234, in *Mathews* v. *Whetton*. In the above case of *East* & *Harding*, (see Owen, 63.) Popham said, 'the feoffee or lessee shall have advantage of all forfeiture belonging to land, as in case of feoffment and the like, but on the contrary for not doing of fealty.' *Ante*, pp. 14, 15.

(84) *Doe* d. *Tarrant* v. *Hellier*, 3 T. R. 172.

(85) Co. Cop. s. 60. Tr. 139. Gilb. Ten. 334.

(86) Gilb. Ten. 249. *Ib.* n. 177. *Eastcourt* v. *Weeks*, 1 Salk. 186. S. C. Lutw. 799. *Lady Montague's* case, Cro. Jac. 301. *Chamberlain* v. *Drake*, 2 Sid. 8, 9. Lex Cust. 219. *Doe* d. *Tarrant* v. *Hellier*, sup.

And the same distinction between forfeitures at the election of the lord, and those which cause a disherison, would appear to hold with respect to the heir whose ancestor did not take advantage of a forfeiture happening in his lifetime (87).

If, however, the copyholders of a manor belonging to a bishoprick, during the vacancy of the See, commit a forfeiture by cutting timber, as no laches are imputable to any one, the succeeding bishop may bring an ejectment (88).

But it seems that a grantee or lessee of a manor shall not take advantage even of an absolute forfeiture, happening prior to the grant or lease, and this because a right of entry, or of action, cannot be transferred (89).

ALIEN. If an alien purchase copyhold land, (even if the purchase be made in the name of a trustee,) he shall not retain it, and it has been said that the lord of the manor, and not the King, may

(87) Vide *Cornwallis* & *Hammond*, Palm. 416. S. C. *(Cornwallis* & *Horwood)*, Lat. 226. *Eastcourt* v. *Weeks*, ante, n. 86. 2 Vent. 39. Anon. 1 Freem. 516. And see the pleadings in *Eastcourt* & *Weeks*, Lex Man. App. pl. 40. In that case it was agreed, that if one of several coparceners die before entry for a forfeiture, by leasing without license or by committing waste, no advantage can afterwards be taken of the forfeiture. And the Court there held also, that a forfeiture cannot be divided, and therefore if coparceners are not agreed, neither can enter.

(88) Bull. N. P. 107, cites *Read* & *Allen*, as so adjudged by Comyns, Oxford Circuit, 1730.

(89) Co. Cop. s. 60. Tr. 139. *Penn* v. *Mervait*, Ow. 63.

take advantage of the purchase (90). But as the incapacity of an alien to hold lands within the King's dominions, originated in state policy, so, I apprehend, the advantage to be taken of any purchase made, either of freehold or copyhold land, by a person not being a natural born subject, is part of the royal prerogative, which could not, by the most forced construction, be held to have been transferred to the lord of the manor, under any existing or presumed grant of the manor from the crown (91). And should the lord consent to admit an alien (92), there does not seem to be any good reason for denying the crown the right of exercising this prerogative, a right which is sanctioned by the authority of Lord Coke (93); and which principle was urged in *Calvin's* case (94), namely, that 'when an alien born purchaseth any lands, the King only shall have them, though they be holden of a subject, in which case the subject loseth his seigniory.'

2 Vent. 39. *Cornwallis & Hammond*, ubi sup. 6 Vin. Cop. (T. c.) pl. 7. But see cont. per Dyer, 4 Leo. 224. ca. 348. *Ante*, tit. 'Statutes,' p. 99. n. 134.

(90) Per Harison, Reader of Lincoln's Inn, 1632. See Dy. 302. b. marg. Ib. 2. b. marg. But see 1 Mod. 17. Aleyn, 14, 15. See also Veill. Dy. 303. a. pl. 46. marg. Co. Litt. 2. b. n. 4. Vin. Abr. tit. 'Alien.' (A. 8).

(91) Kitch. f. 2. (citing Stamf. 10.) says, "If the King grant a lordship to one in fee, the grantee shall not have his prerogative."

(92) *Ante*, p. 125.

It would however be a very hard case, that the lord should lose the advantages of the fines and services in respect of any copyhold purchased by an alien, if the lord admitted him in ignorance of the incapacity.

(93) Co. Litt. 2 b.

(94) 7 Co. 25. a.

If however the purchase be made in the name of a trustee, particularly if the lord were not privy to the trust, the King, I conceive, would be intitled to have the benefit of the trust only, all the fruits of the copyhold tenure being continued to the lord of the manor, from the legal estate in the trustee (95).

OF LICENSES TO DEMISE, &c. AND OTHER DISPENSATIONS OF FORFEITURE (96).

A Copyholder, except by special custom (97), cannot grant a lease of his copyhold tenement be-

(95) *The King* & *Holland*, Sty. 20, 40, 75, 84. In this case a copyhold was surrendered to J. S. in trust that Holland an alien should receive the profits thereof to his own use and benefit; upon this an inquisition was taken for the King, and this matter found; whereupon the copyhold was seized into the King's hands, and upon a trial concerning the lands there was a special verdict, after which the question of the King's title was several times argued in the Court of King's Bench, and ultimately judgment was given against the King; whose remedy would appear to have been by a bill in equity for an execution of the trusts. 1 Roll. Abr. 194. Alien. A. 8. See as to an Equitable Escheat, *ante*, tit. "Trust Estates."

(96) It has been said that parceners cannot make partition without the lord's license, but see ante, p. 104. n. 154.

(97) *Wilcock's* case, 2 D'Anv. 195. pl. 9. *Jackman* v. *Hoddesdon*, Cro. Eliz. 351. *Kensey* v. *Richardson*, Cro. Eliz. 728. *Turner* v. *Hodges*, Hut. 101. S. C. Litt. Rep. 233. S. C. Het. 128. *Mathews* v. *Whetton*, Cro. Car. 233. *Petty* v. *Evans*, 2 Brownl. 40. *Cramporn* v. *Freshwater*, Brownl. 133.

yond the term of a year (98), without the license of the lord of the manor, operating as a dispensation with the forfeiture which the act would create: this is, indeed, a necessary consequence of the rule, that a copyholder cannot convey away his interest by any common-law assurance, or do any act to the prejudice of the lord's freehold, unless he is consenting thereto.

The terms upon which the lord's license for the copyholder to demise is to be obtained, must depend upon the custom of each particular manor, in like manner as the fine on admittance; but the license is usually given either in or out of court, as a matter of course, on payment of a certain fixed sum for each house or acre of land, for each year of the term of the proposed lease (99).

The fine for a license to pull down a house or other building, or for any act considered as a deterioration of the estate, is of course dependent

(98) Kitch. 113, in his charge to the homage, says, "Also if "any copyholder lets his copy-"hold land for longer time "than for a year *and a day* "without surrender, unless it "be by the custom, that he "may let for longer time, and "if he do, it is a forfeiture, and "inquirable." *Ante*, p. 494. et seq.

(99) Kitch. 166, 242.

A custom that on payment of 10 years rent the lord should license to let for 99 years, and that if he refused, the tenant might do it without license, was adjudged good. Cited by Moreton in *Porphyry* v. *Legingham*, 2 Keb. 344, as in the case of *Grove* & *Bridges*.

A custom that a lessee for life may lease per autre vie is not good. Mo. S. pl. 27. H. 3 E. 6. And see Godb. 171. pl. 236.

on the circumstances of each particular case, and therefore the subject of convention between the lord and tenant (100).

It frequently happens that the license to demise is applied for, and acted upon, without a due consideration of the extent of the lord's interest in the manor, for it is quite clear, that the lord cannot grant a license or dispensation for a longer term in the tenancy, than he has in the seigniory (101), unless under a power springing from the fee.

This circumstance renders it expedient that in all settlements of manors, of which copyholds are holden, but more particularly when the property has been usually let on long leases, or is likely to become improveable by building or otherwise, a power should be inserted, authorising the person in possession of the manor for the time being, (however limited his interest,) to grant licenses to demise for such period of time, and under such restrictions as circumstances

(100) When the custom has settled the fine for licenses of this nature, it would seem that the lord may be compelled in equity to grant a license, *Ballard* v. *Agard*, cited Toth. 107-8. 6 Vin. Cop. (Y. e.) pl. 8.; but not otherwise, see 1 Vol. Cas. & Op. 177. Pre. Ch. 572, in *Sir H. Peachy* v. *Duke of Somerset*.

An agreement to grant a license, for which a consideration is paid, will, of course, be enforced in equity. *Hungerford* v. *Austen*, Nel. C. R. 49.

(101) *Petty* v. *Evans*, 3 Brownl. 40. S. C. (*Petit* & *Debbans*), 6 Vin. Cop. (L. d.) 1 Roll. Abr. 511. (K.) Gilb. Ten. 203, 299. *Manifax* v. *Baker*, 1 Keb. 25.

may seem to require; taking the usual fines, and conforming in all respects to the custom of the manor.

It is doubted whether a steward can grant a license to demise *virtute officii*, as a license is not a ministerial act, yet I apprehend, under a special authority, the steward may grant licenses to alien by deed, either in full court or out of court (102); and that by particular custom, even without an express authority, a license granted by him in court will be good (103): and it would seem that the lord's signing the court book, or receiving the fine, or the like act, would be a confirmation of the license (104).

When a license or dispensation is obtained for creating a common-law interest, or other act operating to the lord's prejudice, the terms of such license or dispensation must be strictly pursued; so in *Jackson* v. *Neal* (105), it was held, that a license to let for 21 years from Michaelmas, would not authorise a demise for that term from the Christmas following.

And when a license has been acted upon to the full extent of it, a second lease under it would not be warranted (106).

(102) *Ante*, p. 128, &c.

(103) Kitch. 166. Scroggs, 87.

(104) Co. Cop. s. 44. Tr. 101-2. Kitch. 166. 2 Watk. on Cop. 117.

A license may be presumed here a grant would not, *Doe* & *Wilson*, 11 East, 56.

(105) Cro. Eliz. 394.

(106) Mo. 184. ca. 329. It was doubted in this case whether the second lease would be a forfeiture. Vide 6 Vin. Cop. (H. c.) pl. 1 & 2.

But a demise for a less term or interest than is authorised by the license, will be good; therefore under a license to demise for five years, a copyholder of inheritance or for his own life, may lease for three years, or for the five years, determinable with his life (107).

And in *Hall* v. *Arrowsmith* (108), under a license to a copyholder for life to let for three years if he so long lived, a lease for three years without any limitation, was held good as a lease for three years determinable with the life of the copyholder; but it was said, that if the copyholder had had an estate in fee, the lease would have been a forfeiture, because then he would have done more than he was licensed to do.

And in this case the court agreed, that such a license could not be made to be void by a condition *subsequent*, but that there might be a condition *precedent*, because then it was no license until the condition performed.

As a license to demise operates only as a dispensation on the part of the lord, it follows that a lease by tenant in tail, with license of the lord, will not bind the issue in tail (109).

(107) *Worledge* v. *Benbury*, Cro. Jac. 436-7.

(108) Popham, 105. S. C. (called *Haddon* v. *Arrowsmith*.) Cro. Eliz. 482. S. C. Ow. 78. and see a similar determination in *Worledge* v. *Benbury*, sup.

(109) Kitch. 166, who adds, "But if the tenant in tail of copyhold let for 40 years by the lord's license, and after the lease make his forfeiture of his copyhold, and the lord seies it, and grants that over again by copy to the tenant in tail and his heirs, or to J. S. and his heirs, it seems there the issue of the lessor, nor J. S.,

A custom for a copyholder in fee to alien for a thousand years without license, has been adjudged a good custom (110); but a custom for a tenant at will to make a lease for life by license of the lord, could not be supported (111).

As the lord can seize as for a forfeiture if the tenant should let the houses fall or go to decay, so it would seem that a copyholder, even if he be a mortgagee only, may without a license pull down houses that are in a ruinous state, and build others (112).

A lease with license, it must be recollected, is a common-law and not a copyhold interest, and may be assigned without any further license of the lord (113).

It is extendible at law (114), and will be good even against the lord by escheat, if the license were granted by him, or his ancestor or predecessor, seized in fee simple of the manor (115),

nor the lord, cannot enter and defeat this lease.

[1] The same law is if a copyholder of an estate tail lets for 40 years by the lord's license, and dies, and his issue surrender to J. S. and his heirs, this issue nor J. S. cannot enter and defeat this lease.

(110) *Porphyry* v. *Leigingham*, 2 Keb. 344, cites *Grove* & *Bridges*; and see *ante*, n. 99. Vide also *Turner* v. *Hodges*, Hutt. 101.

(111) Godb. 171. ca. 236.

(112) *Hardy* v. *Reeves*, 4 Ves. 480.

(113) Co. Cop. s. 51. Tr. 119, 120. 3 Leo. 69. pl. 106. *Johnson* v. *Smart*, 1 Roll. Abr. 508. pl. 14. 2 D'Anv. 105. 1 Watk. on Cop. 301.

(114) Gilb. Ten. N. 148-9. see contra *Pictor's case*, 1 Roll. Abr. 889. (M.) pl. 3. Leo. Cust. 19. sed vid. Poph. 188.

(115) *Sammaston* v. *Miller*, Hob. 177. Kitch. 166. *Twiller* v. *Hodges*, supra. Kitch. 102.

but not against a remainder-man or reversioner (116).

Forfeitures may also be dispensed with or waived in various ways, after the lord's title of entry and seizure has accrued (117); as for instance, by the re-admission of the copyholder who committed the forfeiture (118), or by the admittance of his heir (119); or even, as it should seem, by the presentment of the death of him who committed the offence, such presentment being an acknowledgment of him as a tenant (120); or by the amercement of him for non-appearance (121); or by the acceptance of a surrender from him (122); or

(116) *Ante*, p. 522.

(117) In *Penn* v. *Merivall*, Ow. 63, it was held, that a grant of the freehold before entry for a forfeiture by leasing without license, was an affirmance of the lease. sed qu?

(118) *Page* v. *Smith*, Holt, 161. *Milfax* v. *Baker*, 1 Lev. 26. *Clerk* v. *Wentworth*, Toth. 107. *Doe* & *Hellier*, 3 T. R. 172.

(119) *Munifus* v. *Baker*, 1 Keb. 26.; but see *Smith* v. ——, 30 Eliz. cited Toth. 107. 6 Vin. Cop. (A. d.) pl. 8.

(120) *Doe* & *Hellier*, 3 T. R. 171, where Lord Kenyon expressed his opinion, that not only admission of the copyholder or his heir, but any act of recognition on the part of the lord, would preclude him from taking advantage of a forfeiture.

(121) 1 Freem. 517. *Sir John Brauncke's* case, 1 Leo. 104: it was there held to be a dispensation, although the amercement should not be entreated or levied.

(122) 1 Freem. 517. Litt. p. 177, says, "If copyholder lets "by indenture, which is for- "feiture, and after surrender "to the use of J. S. and he is "admitted in, the lord after "shall not take advantage of "forfeiture."

of rent or services, or by distraining for either (123).

And an act by a lord *pro tempore*, which amounts to a dispensation, will bind those intitled to the manor in remainder or reversion, but not so as to give effect to a grant of a common law interest (124).

But a lord by wrong, as by disseisin, cannot dispense with a forfeiture to bind the rightful lord (125).

And it is essential that the forfeiture should be known to the lord, otherwise the admittance, acceptance of rent, or like act, will not operate as a dispensation (126); but the lord shall be presumed to have notice of failure of suit of court, non-payment of rent, &c. (127).

(123) *Eastcourt* v. *Weeks*, 1 Salk. 186. 1 Freem. 517. *Garrard* v. *Lister*, 1 Keb. 15. *Hamlen* v. *Hamlen*, 1 Bulst. 189. *Bacon* v. *Thurley*, Toth. 107. Gilb. Ten. 247-8, 334-5. Co. Cop. s. 61. Tr. 140. 6 Vin. Cop. (A. d.) but see Godb. 47.

Acceptance of rent is of an ambiguous nature, *Doe* & *Hellier*, 3 T.R. 171.

(124) *Milfax* v. *Baker*, 1 Lev. 26. S.C. (*Munifax* v. *Baker*); 1 Keb. 26. And see Holt, 161. 3 Salk. 100. *Ante*, p. 522. 525-6.

(125) *Milfax* v. *Baker*, sup.

(126) *Mathews* v. *Whetton*, Cro. Car. 234. *Mantle* v. *Wollington*, or *Mantell* & *Weckington*, Cro. Jac. 166. 1 Roll. Abr. 475. (C.) Co. Cop. s. 61. Tr. 140. Gilb. Ten. 247. Ib. N. 178. And see 2 D'Anv. 207. 1 New. Abr. 489. 6 Vin. Cop. (A. d.) pl. 14. Com. Dig. Cop. (M. 8.)

(127) *Lord Cornwallis's* case, 2 Vent. 39. And see *Wheeler's* case, 4 Leo. 240, where the widow intitled to freebench during chaste widuity, was admitted by the lord after incontinency, but of which he had no notice, and the lord was held to be bound by the admittance.

A lease for a term of years, without license, and all such other acts as do not tend to the destruction of the copyhold interest, such, for instance, as waste, subtraction of suit, &c. may clearly be dispensed with by the lord *pro tempore*, however limited his estate (128); but an act which tends to the total annihilation of the copyhold interest, as a feoffment with livery, appears to preclude any subsequent affirmance of such interest, except under a new substantive grant (129).

It has been doubted whether an attainder of treason or felony, is not also such a destruction of the copyhold interest, as to preclude an act of dispensation (130); but as the crimes of treason and felony go to the incapacity only of the person, I must suppose, that a forfeiture by the commission of either offence, is as open to the dispensation of the lord, as any other act inconsistent with the nature of a copyholder's interest, under the original grant of the estate.

We have already seen that there is no relief in equity against an act of forfeiture which tends to the disherison of the lord (131); but when the forfeiture is not wilful, as in the case of permis-

(128) *Ante*, (N. 124.)

(129) Co. Cop. s. 61. Tr. 140.

(130) 1 Watk. on Cop. 351.

(131) *Ante*, p. 494, 495, (N. 7.) But see *Shelley* v. *Mason*, in Lord Coventry's time, 5 Car. 1, cited in *Sir Henry Peachy* v. *Duke of Somerset*, 1 Stra. 449, where a copyholder is said to have been relieved against a forfeiture by making a lease without a license. 6 Vin. Abr. p. 114.

sive waste (132), or waste by a stranger (133); and where a compensation can be made to the lord, as on non-payment of fines or rents (134); or where there is a reasonable excuse, as in the case of a Quaker's refusal to take the oath of fealty (135), a Court of Equity will relieve against the forfeiture.

In the case of *Thomas* v. *Porter & The Bishop of Worcester* (136), which was a bill in Chancery to be relieved against a forfeiture for felling trees, the Court directed an issue to try, whether the primary intention in felling the timber was to do waste? or, (as the order was drawn up,) whether the supposed waste was wilful or not? Upon two several trials it was found for the plaintiff, and the decree was, that the plaintiff should be relieved, and the defendant to deliver possession and account for the mesne profits.

(132) *Thomas* v. *Porter* & *Bishop of Worcester*, 1 Ch. Ca. 95. 2 Freem. 137. *Commin* v. *Kinsmell*, cited Toth. 108, and 6 Vin. Cop. (E. d.) pl. 3. Pre. Ch. 574, in *Sir Henry Peachy* v. *Duke of Somerset*.

(133) *Ante*, p. 509. (n. 61.)

(134) 1 Stra. 449, 453, in *Sir H. Peachy* v. *Duke of Somerset*. *Marsh* v. *Fuller*, 6 Vin. Cop. (D. c.) pl. 9. *Whistler* v. *Cage*, Ib. *Lucas* v. *Pennington*, 1 Nel. C. R. 7. But the doctrine of compensation is not extended to acts of voluntary waste, or of disinherison to the lord. *Ante*, p.p. 494, 495, n. 7, 509. but see contra as to voluntary waste, 1 Eq. Ca. Abr. 121, in *Cox* v. *Higford*.

(135) *Cox* v. *Higford*, 2 Vern. 664. *Cudmore* v. *Raven*, or *Edmore* v. *Craven*, cited ib. and in Pre. Ch. 574. 1 Stra. 450. 6 Vin. Cop. (D. c.) pl. 9.

(136) Sup. and see *Doe* d. *Foley* v. *Wilson*, 11 East, 56.

And in another case (137), where a forfeiture had been committed by cutting down timber on one copyhold to repair the tenements on another, the Court of Chancery relieved against the forfeiture, on payment of all the costs both at law and in equity.

(137) *Nash* v. *Earl of Derby*, 2 Vern. 537. Pre Ch. 574. 1 Stra. 450. 2 Eq. Ca. Abr. 121. And see *Rowland* v. *Dean of Exon*, cited 1 Stra. 450. *Morley* v. *Earl of Derby*, cited 2 Vern. 665. 4 Ves. 705. A forfeiture by neglect of reparation will be purged by the repairs being done before the entry of the lord. Gilb. Ten. 249.

CHAP. XII.

Of the Action of EJECTMENT, *and the several* PLAINTS *in nature of Common-Law Writs: And of* EVIDENCE, PLEADING, PRESCRIPTION, *&c.*

FIRST, OF EJECTMENT.

ALTHOUGH a copyholder must in every action real implead and be impleaded in the manor court (1), yet it has long been established, that he may try his title in an action of ejectment in the courts of common law.

In the case of *Melwich* & *Luter* (2), the first point resolved was, that the lessee of a copyhold for one year might maintain ejectment, in as much as his term is warranted by law, and that it is a speedy course to recover the possession of land against a stranger.

But as a copyholder cannot demise beyond the term of a year without the license of the

(1) *Stevens* v. *Eliot*, Cro. Eliz. 483. Post. tit. 'Customary Plaints.'

(2) 4 Co. 26. a. S. C. Cro. Eliz. 102.; and see Co. Cop. s. 51. Tr. 119. *Cole* v. *Wall and Burnell*, Cro. Eliz. 224. S. C. (*Cole* v. *Walles*). 1 Leo. 328. *Spark's* case, Cro. Eliz. 676. S. C. (called *Sprake's* case), Mo. 569. *Frosel* v. *Welsh*, Cro. Jac. 403. Anon. Godb. 268. Gilb. Ten. 213. *sed vide Stephens* v. *Eliot*, sup. *Laughter* v. *Humphrey*, Cro. Eliz. 524.

lord, unless indeed by special custom, it has been doubted whether the lessee *for years* of a copyholder could recover in ejectment, without alleging a custom, or shewing a license (3).

The objection has arisen out of the settled rules, that the plaintiff in ejectment must recover by the strength of his own title, not by the weakness of his adversary's (4), and that it will be sufficient for the defendant in ejectment to prove a title out of the lessor of the plaintiff, though he have no title himself (5); and, consequently, if it appear by the plaintiff's own shewing that the lord is entitled to enter for a forfeiture, how, it is asked, can the declaration be supported?

There is certainly much *dicta* for the position that it cannot (6), but I must submit that it is quite clear, that a copyhold may be recovered under a declaration upon a lease for years, with-

(3) *Wells* v. *Partridge*, Cro. Eliz. 469. a. 2 Esp. N. P. 449. *Erish* v. *Rives*, Cro. Eliz. 717. *Cramporn* v. *Freshwater*, Brownl. 133. *Gregory* v. *Harrison*, Mo. 679. Supp. Co. Cop. s. 20. and see *Ever* v. *Aston*, Mo. 272. S.C. 1 And. 193. Gilb. Ten. 213. et. seq. But see *Rumney* v. *Eves*, 1 Leo. 100. Gilb. Ten. 436. N. 92. Post. n. 8, 9.

(4) By Lord Mansfield, see 4 Burr. 2487. 2 Esp. N. P. 455.

(5) Bull. N.P. 110.

(6) *Ante*, (n. 3). In *Petty* v. *Evans*, 2 Brownl. 40, it was held, that in an ejectment by the lessee of a copyholder, it is sufficient that the count be general, without any mention of the license, and that if the defendant plead not guilty, then the plaintiff ought to shew the license in evidence: But that if the defendant plead specially, then the plaintiff ought to plead the license certainly in his replication, and the time an place when it was made.

out shewing a license or alleging a custom, and this not only from the common rule, that the defendant shall confess lease, entry, and ouster, (making the execution of a lease unnecessary,) and by which any question as to forfeiture is avoided; but that, as between the copyholder and a stranger, the court would presume that there had been a dispensation of the forfeiture, unless the lord had actually entered.

And it is to be observed, that although the defendant need not shew a title in himself, yet he must prove a *subsisting* title out of the lessor, so that producing an ancient lease for 1000 years will not in a freehold case be sufficient, unless possession under it within 20 years is also proved, and production of a mortgage deed, where the interest has not been paid, and the mortgagee never entered, will not be sufficient to defeat the lessor, who claims under the mortgagor, because it will be presumed that the money was paid at the day, and, consequently, that it is no subsisting title (7).

And in *Downingham's* case (8), it was expressly resolved by the Court of B. R. that if a copyholder make a lease for years which is not according to the custom of the manor, yet the lease is good, so that the lessee may maintain an ejectment, for that it had been several times ad-

(7) Bull. N.P. 110. cites *Wilson* v. *Witherby*, 8 Ann. in Kent. by Holt, Ch. J.

(8) Ow. 17, 18. And see *Streat* v. *Virrall*, cited Cro. Car. 304. *Peter's* case, cited Godb. 365.

judged in that court, that between the lessor and lessee, and all other, except the lord of the manor, such a lease was good.

Again, in *Goodwin* v. *Longhurst* (9), all the barons of the exchequer held, that the lessee for years of a copyholder might maintain ejectment, for that it was a good lease between the parties, and against all others but the lord.

But it is quite clear that an ejectment cannot be maintained by a copyholder, except under a lease at common law (10).

We have seen that a surrenderee may recover in ejectment upon a demise laid between the date of the surrender and admittance, and that it is sufficient if the lessor of the plaintiff is admitted at any time before trial (11), and this be-

(9) Cro. Eliz. 535. The same was said in the case of *Homes* & *Bingley*, see Sty. 380. Again in *Wheeler* v. *Toulson*, Hard. 330, it was said, that if a lease be found made by a guardian or a copyholder, such a lease will maintain the declaration, though their leases and grants are void against the lord and the infant. Vide also *Collins* v. *Harding*, Cro. Eliz. 623. *Stoper* v. *Gibson*, Mo. 539. *Rumney* & *Eves's* case, 1 Leo. 100. *Cole* v. *Walles*, Ib. 328. S.C. (*Cole* v. *Wall and Burnell*,) Cro. Eliz. 224. *Sparks* case, Cro. Eliz. 676. S.C. (called *Sprake's* case,) Mo. 569. *Haddon* v. *Arrowsmith*, Cro. Eliz. 462. a. N. 92. Gilb. Ten. Runnington on Ejectment, 226, Ballantine's Ed. 262. But see *Jackson* v. *Neal*, Cro. Eliz. 395.

(10) *Sparks* or *Sprake's* case, sup. *Cole* v. *Walles*, (or *Cole* v. *Wall* & *Burnell*,) sup.

(11) *Benson* v. *Scott*, 1 Salk. 185, &c., (*ante*, p. 87. n. 84.) *Roe d. Jeffereys et al.* v. *Hicks et al.* 2 Wils. 15. *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2786-7. *Holdfast* d. *Woollams* v. *Clapham*, 1 T.R. 600. *Doe* d. *Bennington* v. *Hall*, 16 East, 208. *Ante*, p. 152-4, 350.

cause the title of the surrenderee when admitted, is perfect from the time of the surrender, as against all persons but the lord of the manor: this doctrine applies equally to a purchaser and mortgagee (12).

And it is already shewn that the customary heir may bring an ejectment before his admittance, such admittance being only necessary as between the heir and the lord (13): it is not even requisite that he should be presented to be the heir (14).

And under a reversionary grant to B. (the nominee of A. a copyholder for life), to hold to B. for the term of his life, immediately after the death surrender or forfeiture of A., the *legal* title of B. is perfect without admittance, and he may maintain ejectment on the death of A. (15).

In the above case of *Holdfast* & *Clapham*, Ashhurst J. in delivering the opinion of the court, establishing the relation of the admittance to the date of the surrender, said, " If then the

(12) *Holdfast* d. *Woollams* v. *Clapham*, 1 T. R. 600.

(13) *Ante*, p. 346. *Roe* & *Hicks*, 2 Wils. 15.

(14) *Rumney* & *Eyes*, 1 Leo. 100. 1 T.R. 601.

(15) *Roe* d. *Cosh* v. *Loveless*, 2 Barnew. & Ald. 453.

In the case of *Anderson* & *Heywood*, 3 Leo. 221, 4 Leo. 30, it was holden, that a copyholder of inheritance of a manor in the hands of the King, and who was ousted of his copyhold, had not gained any estate so as he might make a lease for years, upon which to maintain an ejectment, but that he had a possession only against all strangers. And see *Nalson* v. *Remington*, Clayt. 1, *Ante*, p. 150, 402.

" surrenderor is only considered in the light of a " trustee, for the surrenderee, whatever might " have been the case formerly, in these days the " courts have considered this species of action " with greater liberality, and will never suffer a " trustee to set up a formal objection against the " plaintiff's recovering the possession of that pro- " perty, which he only holds in *his* right, and for " *his* benefit."

But it is now deemed to be fully settled, that a person cannot recover in ejectment even against his own trustee, upon an equitable title (16); for although a court of law will in many cases direct a jury to presume the surrender of a term of years (17), and also a surrender by a copy-holder (18); yet the legal title will prevail, where a surrender cannot by possibility under the circumstances be presumed (19).

And in the case of *Doe* & *Wroot* (20), where the heir at law of the mortgagor who had not surrendered to the use of his will, recovered in ejectment against his devisee, the mortgagee not having been admitted, Lord Ellenborough, C. J. said, " We can only look to the legal estate, and " that is clearly not in the devisees, but in the

(16) See the cases mentioned in the report of *Doe* d. *Shewen* v. *Wroot and others*, 5 East, 138-9. n. (a). and *Doe* d. *Wood* v. *Morris*, 8 Taunt. 54.

(17) Bull. N. P. 110; 2 T. R. 696.

(18) *Roe* & *Lowe*, 1 H. Bl. 457-9. 1 Ves. 235 in *Cookes* v. *Hellier*. *Ante*, p. 266, 285.

(19) 2 T. R. 696.

(20) *Sup.*

" heir at law of the surrenderor; and if the de-
" visees have an equitable interest, they must
" claim it elsewhere, and not in a court of law.
" For as to the doctrine, that the legal estate can-
" not be set up at law by a trustee against his
" *cestui que trust*, that has been long repudiated;
" ever since a case which was argued in the Ex-
" chequer chamber some years ago." (21).

In bringing the action of ejectment for recovering the possession of copyholds, it must be recollected that tenants in common cannot recover upon a joint demise (22); but that joint-tenants or coparceners may join in the demise (23), or recover on the single demise of their respective shares (24).

When a person has the legal title, he may defend himself in ejectment, although twenty years' possession (not being the possession of the lessor of the plaintiff,) should have run against him before he took possession, *Doe* d. *Burrough and Wife* v. *Reade* (25): in that case copyhold lands

(21) Lord Ellenborough is supposed to have alluded to the case of *Weakley* d. *Yea*, Bart. v. *Rogers*, B.R.Tr.T.29.Geo.3. See N. a. 5 East, 138.

(22) Cro. Jac. 83, 166. 2 Wils. 232. 2 Sir W. Bl. 1077.

(23) *Boner* v. *Juner*, 1 Lord Raym. 726, in which Holt, C. J. held, that the case of *Milliner* & *Robinson*, in Mo. 682. was not law. B. N. P. 107.

(24) 6 East, 181-2. *Roe* d. *Raper* v. *Lonsdale*, 12 East, 39. 12 East, 61. Or on a demise of the whole by each, *Doe* & *Fenn*, 3 Campb. 190. See further as to proceedings in ejectment to recover possession of copyholds, post tit. 'EVIDENCE.'

(25) 8 East, 353.

Twenty years' possession by a mortgagee of copyholds is

were granted in 1735 to A. to hold to him and his sons B. and C. successively during their lives, and the life of the longest liver; B. being dead, C. in 1777 purchased by copy the reversion of the premises on the determination of the estate of A. and of his own life estate, to hold to his son D., then an infant, during his life, who was admitted. In 1786 C. surrendered his own life interest and the reversionary interest of his son D., then still a minor, (but over which interest he had no control,) and took another grant to hold to C., his daughter E., and his said son D. successively, and C. was admitted thereon, and continued in possession till his death in 1806, whereupon D. entered, against whom his sister E. and her husband brought an ejectment. At the trial at Salisbury a verdict was given for the plaintiff, with liberty for the defendant to move to set it aside, if the court should be of opinion with him: on the motion for a new trial, the ground relied upon by the defendant was, that the purchase of the reversionary estate by C., to hold to the defendant D. (his son), was, according to the case of *Dyer* v. *Dyer* (26), and other cases of that class, an advancement of the son by the father, and which gave the son the legal and beneficial

prima facie a bar to the equity of redemption, but special circumstances may have the effect of keeping the redemption open. *Barron* v. *Martin*, 19 Ves. 327. Coop. 189.

(26) 2 Cox Ch. Ca. 92. *Ante*, p. 465-6.

interest; unless a custom in the manor had been shewn, by which he was a trustee for his father, or it had appeared by any concurrent act of the father, that he did not so intend it.

For the plaintiff it was urged, that there was an adverse possession in C. for above 20 years, as his possession must be referred to the new copy, in which the defendant's life was postponed to that of the lessor of the plaintiff, and that as D. could not have maintained an ejectment, his right of entry being ousted, so it did not vary the question, that he got into possession after the 20 years adverse possession; but the court held, that D. had the legal and equitable right, and might retain possession; the possession of C. for 20 years after the surrender of his life estate, by which the reversion was let in, not being the possession of the lessor of the plaintiff: and a rule to shew cause why a new trial should not be granted was made absolute.

And a copyholder who has been in possession of mines for 20 years, is protected by the statute of limitation of 21 Jac. 1. c. 16. against an action of ejectment by the lord of the manor, as mines are a distinct possession from the manor, and may be a distinct inheritance (27).

But the above statute of limitation being applicable to copyhold property, a copyholder after 20 years *adverse* possession, is driven to the

(27) *Rich* d. *Lord Cullen et al.* v. *Johnson et al.* 2 Stra. 1142. And see *Curtis* v. *Daniel*, 10 East, 273. *Ante*, pp. 24-5, 486.

several customary plaints, in nature of possessory actions and writs of right, which I propose to treat of in the succeeding section; yet as the possession must be adverse, a copyholder, or his heir or devisee, may enter at any time within 20 years after the expiration of an existing lease, although a right of re-entry should have accrued, as for a condition broken by non-payment of rent; for, during the lease, the lessor could not enter or support an ejectment, neither is he bound to enter for a forfeiture committed(28).

(28) *Doe* d. *Cook et ux.* v. *Danvers*, 7 East, 299. And see *Doe* & *Brightwen*, 10 East, 591.

By the 1st sect. of 21 Jac. 1. c. 16, it was enacted, that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time thereafter to be sued or brought by occasion or means of any title or cause thereafter happening, should be sued and taken within 20 years next after the title and cause of action first descended or fallen, and at no time after the said 20 years, and that no person or persons should at any time thereafter, make any entry into any lands, tenements, or hereditaments, but within 20 years next after his or their right or title, which should thereafter first descend or accrue to the same, and in default thereof, such persons so not entering, and their heirs, should be utterly excluded and disabled from such entry after to be made.

And it is to be recollected that by the 2d sect. of the same stat. it was enacted, that if any person or persons entitled to such writ or writs, or having such right or title of entry, should be at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such person and persons, and his and their heirs, should

Secondly, Of Customary Plaints in the Nature of Possessory Actions and Writs of Right (29).

A copyholder must in every action real, implead and be impleaded in respect of his copyhold land, in the court of the manor of which it is holden, and therefore in case of ouster by a stranger, he cannot implead him by the king's writ, but only by plaint in the lord's court, with protestation to prosecute his suit in the nature of a writ of entry, or of assise of novel disseizin, or *mort d'ancestor*, or in the nature of the grand

or might, notwithstanding the said 20 years were expired, bring his action, or make his entry, as he might have done before that act, so as such person and persons, or his or their heirs, should within 10 years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, *or death*, take benefit of, and sue forth the same, and at no time after the said 10 years.

But the 10 years is given to the heirs only from the death of the person dying under disability, and not in addition to the 20 years mentioned in the first section, *Doe* & *Jesson*, 6 East, 80. If the statute begins to run no subsequent disability will avail, *Doe* & *Jones*, 4 Tr. 300: And this rule extends to the 10 years' clause. *Wright* v. *Perkins*, Lin. Lent. Ass. 1733-4. MSS.

(29) Every real action is either *possessory*, viz. of his own possession or seizin, or *ancestrel*, viz. of the seisin or possession of his ancestor, 6 Co. 3. And real actions ancestrel are either *possessory*, viz. where the ancestor dies in possession, and the lands descend, or *rightful*, viz. when only the right descends from the ancestor, Ib.

writ of right (30); the process upon plaints for copyhold lands being analogous to the common law writs in real actions (31).

And this rule applies equally to copyhold lands held of a manor of ancient demesne (32).

In the case of *Scott* v. *Kettlewell* (33), the demandant in a real action, for a copyhold estate in the lord's court, having served the sheriff with the writ of *accedas ad curiam*, to remove it to the Court of Common Pleas, a motion was made to supersede the writ. In support of the motion it was contended that the Court of C. B. has no jurisdiction as to copyholds, which was stated to be the ground that the Lord Chancellor in *Searle* & *Kitner* (34) superseded the writ with costs: The motion was not opposed, and the Lord Chancellor made the order accordingly.

In considering what remedies are afforded to a copyholder by plaint, in analogy to the common law writs, it may be desirable to make some few observations on the distinguishing nature of real

(30) Co. Cop. s. 51. Tr. 118. Co. Litt. s. 76. *Pymmock* v. *Hilder*, Cro. Jac. 559.

(31) Kitch. 153.

(32) F.N.B. 12. b.

(33) 19 Ves. 335, 11 Apr. 1815.

(34) In Ch. 15 Apr. 1809. The reporter adds, "See 4 Co. 21 b. referring to 13 R. 2. Lit. s. 76, 77, and Lord Coke's commentary stating the reason, that the copyholder cannot have the writ of false judgment, being only tenant at will according to the custom; his remedy therefore petition to the lord; and in the case of ouster by the lord without cause of forfeiture, an action of trespass." *Ante*, p. 369.

injuries, and in doing this I propose to pursue the arrangement of Mr. Just. Blackstone in his Commentaries, as a mode the best calculated to elucidate this abstruse branch of copyhold tenure.

OUSTER, or dispossession, is in copyhold cases confined to the following methods: abatement, intrusion, disseizin, and deforcement.

Abatement is where a person dies seized of an *inheritance*, and before the customary heir or the devisee enters, a stranger gets possession of the copyhold tenement (35).

Intrusion, is the entry of a stranger after the determination of a particular estate, and before the entry of him in remainder or reversion (36).

Disseizin, is a wrongful putting out of him that is seized in possession, for an estate of inheritance, or for life (37).

Deforcement, is the unlawful detention of copy-

(35) Co. Litt. 277. a.

(36) *Ib.* F. N. B. 203-4. Whether a devisee in remainder can maintain a writ of intrusion, or a writ to be framed on the stat. of Westm. 2. in nature thereof. See *Romilly* v. *James*, 6 Taunt. 263.

(37) Co. Litt. 277. a. But this species of injury must be understood qualifiedly, and as in contemplation of law only, for a copyholder cannot properly be disseized. 3 Leo. 210. Ca. 274. See also Mo. 189 in *Hill* v. *Morse*. *Ante*, pp. 59, 89, 109. And this consideration renders the doctrine of *continual claim* inapplicable to copyhold property. See 3 Bl. Com. 175. But it should seem that a copyholder who has been ousted must enter before he can surrender, *Ante*, pp. 150, 402, 535. As to disseizin of *incorporeal hereditaments*, see 3 Bl. Com. 170.

hold lands, where the original entry was lawful (38); as where the termor, or a stranger in possession at the expiration of the term, holds over to the exclusion of the remainder-man, or reversioner (39); or where lands are withheld from the widow in the case of freebench (40); or from the lord in the case of escheat (41), but the remedy in the latter case would be at common law, as the lord cannot be judge in his own cause (42).

So if copyhold lands are surrendered on condition, which condition is not performed by the surrenderor, or is broken by the surrenderee, as the case may be, and the surrenderor in the first case, or the surrenderee in the second, continues to hold the lands; this is also a deforcement (43).

So likewise is the withholding lands after avoidance on alienation by an infant or person of *non sane* memory, as against the alienor or his heir (44).

And if one coparcener enter upon and keep possession of the whole copyhold tenement against the other coparceners, this is also a deforcement (45).

(38) Co. Lit. 277. b. 3 Bl. Com. 172-3.

(39) F. N. B. 201.

(40) *Ib.* 147.

(41) *Ib.* 143-4.

(42) *Ib.* 11. m. *Baker* v. *Wick*, 1 Salk. 56. *Brittle* v. *Dade*, *ib.* 185. S. C. 1 Lord Raym. 43.

(43) F. N. B. 204-5. 3 Bl. Com. 173.

(44) F. N. B. 192, 202. 3 Bl. Com. 173-4.

(45) F. N. B. 197. 3 Bl. Com. 174.

So likewise is the non-performance of a covenant to surrender a copyhold to another (46).

A deforcement also signifies the holding of any copyhold lands, to which another person hath a right, and therefore includes the injuries of abatement, intrusion, and disseizin, and every other wrong not comprised under those terms (47).

We will now consider what remedy the law affords for the above injuries.

ENTRY. When the original entry of the wrongdoer is unlawful, as in the injuries of abatement, intrusion, and disseizin, the party injured may make a formal but peaceable entry (48) on any part of the land within the same manor, in the name of the whole; and such entry we have seen will not be tolled by a descent (49).

But when upon a deforcement the original entry was lawful, the owner is driven to his customary plaint; yet entry is allowed on a tenant by sufferance, as he has only a bare possession (50).

(46) 3 Bl. Com. 174. F. N. B. 146.

(47) Co. Litt. 277. b.

(48) 5 R. 2. st. 1. c. 8. 15 R. 2. c. 2. 4 H. 4. c. 8. 8 H. 6. c. 9. 31 Eliz. c. 11. 21 Jac. 1. c. 15. This last stat. expressly authorises the restitution of possession by judges, justices, &c. to tenants by copy of court roll, &c. the same as to tenants of an estate of freehold.

(49) *Ante*, p. 59.

(50) Co. Litt. 57, 271. 3 Bl. Com. 175. But the copyholder may admit himself to be out of possession. On the doctrine of disseizin at election, see *Blunden* v. *Baugh*, Cro. Car. 302. W. Jones, 315. *Taylor* & *Horde*,

And it is already shewn, that no entry can be made, unless within 20 years after the right accrues (51), nor will such entry be of force to satisfy the statute, or to avoid a fine levied of copyhold lands by a disseisor, unless an action be thereupon commenced within one year after, and prosecuted with effect (52).

POSSESSORY PLAINTS. The *possessory* remedies of the copyholder, where entry is not allowable, are by plaints in the nature of *writs of entry* surdisseizin, intrusion, &c. or of *assise*, but which merely restore the party to his possession, without prejudice to the *right of property:* and the judgment or recovery in either of these real actions, is a bar against the other.

The writ of entry disproves the title of him who is in possession, by shewing the unlawful means by which he entered, or continues possession.

The plaint, in analogy to the *precipe quod reddat*, calls upon the abator, intrudor, or the like, either to deliver seizin of the lands, or to shew cause why he will not; which cause may be either a denial of the fact of having entered

1 Burr. 78-9, 111. 6 Bro. P.C. 645. Cowp. 694.

(51) 21 Jac. 1. c. 16. *Ante*, tit. 'Ejectment.' *Shaw* v. *Thompson*, Mo. 411. *Rich d. Lord Cullen* v. *Johnson*, 2 Stra. 1142. *Doe d. Tarrant* v. *Hellier*, 3 T.R. 172-3. *Doe d. Cook and Wife* v. *Danvers*, 7 East 321.

(52) 4 H. 7. c. 24. 4 Ann. c. 16. Co. Cop. s. 55. Tr. 126. Cruise on Fines, p. 118, 211-12, 344.

by the means suggested, or a justification of his entry by reason of title in himself, or those under whom he claims, whereupon possession is awarded to him that hath the clearest right (53).

When the plaint is brought against the abator or intruder, or the like, the defect of his possessory title alone need be stated, but if he has alienated, or if the land has descended to his heir, that circumstance must also be alleged.

One such alienation or descent makes the first degree which is called the *per*, the form of the plaint being that the tenant had not entry but *by* the original wrong-doer, who alienated the land, or from whom it descended to him. A second alienation or descent makes another degree called the *per* and *cui*; the form then is, that the tenant had not entry but *by* or *under* a prior alienee, to whom the intruder demised it (54).

After two degrees, (that is two alienations or descents,) there lay no writ of entry at the common law, but the demandant was put to his writ of right (55), except in abatement, intrusion, and disseizin, where the original entry was unlawful,

(53) 3 Bl. Com. 181.

(54) But in the plaint in nature of a writ of entry in the *per*, it shall be supposed in the *per* by the copyholder, not by the lord. Co. Cop. s. 41. Tr. 91. Booth on Real Actions, 172, makes three degrees; viz. the first in the original wrong done, the second in the *per*, and the third in the *per* and *cui*, which is noticed by Mr. J. Blackstone with the remark, that the difference is immaterial. 3 Com. 181. n. (9). *Vide* F. N. B. 204.

(55) Booth, 173. 2 Inst. 153-4. 3 Bl. Com. 181-2.

and in those cases there was a writ of entry in the *post* at common law (56).

And now by the statute of Marlbridge, 52 Hen. 3. c. 30. when the number of alienations or descents exceed the usual degrees, a new writ is allowed without any mention of degrees, and the writ framed under this statute, is called a writ of entry in the *post* (57), which alleges the original injury without deducing the intermediate title; and it is upon a plaint in the nature of this latter writ, that recoveries of copyholds are suffered.

The plaint in the nature of a writ of entry, is applicable to all the cases of ouster before mentioned, except some peculiar species of deforcements. Such, I submit, is that of deforcement of dower, by not assigning proper dower to the widow, where she is dowable by the custom of the whole or a portion of her husband's copyholds, and for which, I conceive, she has her remedy by plaint in the nature of a writ of dower, *unde nihil habet* (58), if she be deforced of the whole of her dower; or if of part only, so that she cannot say *nihil habet*, then by plaint in the nature of a *writ of right of dower* (59).

And if the heir, (being within age,) or his guar-

(56) Booth, 173-4.

(57) See Mo. 68. pl. 185. Co. Litt. s. 386.

(58) F. N. B. 147.

(59) 3 Bl. Com. 183, 193. Booth's Real Actions, 118. N. B. 8, 147. *Chapman* v. *Pope*, 2 Show, 184.

I am informed that the proceedings and pleadings on a plaint in the lord's court in nature of a writ of dower, are recorded in the manor of Sutton Holland, inter Humphrey Cox and wife theretofore the wife of Richard Raynton, de-

dian, assign the widow more than she ought to have, it may be remedied, I apprehend, by a plaint in the nature of a writ of *admeasurement of dower* (60).

The more ordinary writs of entry are, 1. The several writs *Sur-disseizin*, in nature of an assise (61). 2. *Of intrusion* (62). 3. *Dum fuit infra ætatem* (63). 4. *Dum fuit non compos mentis* (64). 5. *Cui in vita*, and *cui ante divortium* (65). 6. *Ad communem legem* (66). 7. *In*

mandants, and Thomas Raynton, son and heir of the said Richard Raynton, tenant. Aug. 10 Jac. 1, 1614.

(60) F.N.B. 148.

(61) F.N.B. 191. Booth, 172, 175; on *Sur Abatement*, if the injury complained of be of that nature, see *Smith and others* assignees of Eustace a Bankrupt v. *Coffin and Wife*, 2 H. Bl. 444; in which case it was held, that the right to bring a real action, passes to the assignees of a bankrupt, by the bargain and sale of the commissioners.

(62) F.N.B. 203. Booth, 174, 181. See *Eastman* v. *Baker*, 1 Taunt. 174. *Romilly* v. *James*, 6 Taunt. 263.

(63) F.N.B. 192. Booth, 193. See *Knight* v. *Footman*, 1 Leo. 95. Cro. Eliz. 90.

(64) F.N.B. 202. (C.) Booth, 190.

(65) (For a woman, when a widow or divorced, whose husband during the coverture (*cui in vita sua, vel cui ante divortium, ipsa contradicere non potuit,*) hath alienated her estate.) F.N.B. 193, 204. (F.) Booth, 186, 188. But the surrender of the husband is not a discontinuance to put the heir to his plaint in the nature of a *cui in vita*, *Bullock* v. *Dibler*, Poph. 39. S.C. Mo. 596. *Ante*, p. 98.; or the wife if she survive the husband, *Roswell's* case, Dyer, 264. *Ante*, pp. 59, 60, 98, 105. So that a plaint of this nature, is only where recovery by default is against the husband and wife, *Bullock* & *Dibler*, *sup.* or, perhaps, for the wife living the husband. *Roswell's* case, *sup.*

(66) (For the reversioner after the alienation and death of the particular tenant for life,) F.N.B. 207. (G). Booth, 191.

casu proviso and *in consimili casu* (67). 8. *Ad terminum qui præteriit* (68). 9. *Causa matrimonii prælocuti* (69).

THE WRIT OF ASSISE is a real action *which proves the title of the demandant*, merely, by shewing his or his ancestor's possession, and was invented to do justice to the people, by determining questions of title in the proper counties, but before the King's Justices, and this writ does not admit of many dilatory pleas, to which other real actions are subject (70).

It is applicable only to the injuries of abatement and novel disseizin (71).

And when the abatement is on the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, the remedy is by plaint in the nature of an assise of *mort d'ancestor* (72).

If the abatement is on the death of the grand-

(67) (Which lay not *ad communem legem*, but are given by stat. Glosc. 6 Ed. 1.. c. 7. and West. 2. 13 Ed. 1. c. 24. for the reversioner after the alienation, but during the life of the tenant in dower or other tenant for life.) F.N.B. 205-6. Booth, 198, 200. 6 Taunt. 268.

(68) (For the reversioner, when the possession is withheld by the lessee or a stranger, after the determination of a lease for years.) F.N.B. 201. Booth, 195.

(69) (For a woman who giveth land to a man in fee or for life, to the intent that he may marry her, and he doth not.) F.N.B. 205. Booth, 197.

(70) See 3 Bl. Com. 184. Stat. Westm. 2. 13 Ed. 1. c. 24.

(71) F.N.B. 177. Booth, 206, 210.

(72) F.N.B. 195. Booth, 206. But a doubt has been expressed, whether a plaint in the nature of this writ ever lay of copyholds, see 2 Watk. on Cop. 36. n. (g) [2d Ed.]

father or grandmother, then the assise of *mort d'ancestor* no longer lies, and the remedy is by plaint in the nature of a writ of *ayle* or *de avo* (73): if on the death of the great grandfather or great grandmother, then by plaint in the nature of a writ of *besayle* or *de proavo* (74): but if it amounts one degree higher to the *tresayle*, or grandfather's grandfather, or if the abatement is on the death of any collateral relation, other than those before mentioned, the plaint is in the nature of a writ of *cosinage* or *de consanguineo* (75).

These ancestrel writs expressly assert a title in the demandant, (viz. the seizin of the ancestor at his death, and his own right of inheritance,) the assise asserts nothing directly, but only prays an inquiry whether those points be so (76).

There is another ancestrel writ called a *nuper obiit*, to establish an equal division of the land in question, where, on the death of an ancestor, who has several heirs, one enters and holds the others out of possession (77).

But these actions ancestrel, do not lie for an abatement consequent on the death of any collateral relation, beyond the fourth degree, though in the lineal ascent, he may proceed *ad infinitum*.

(73) F.N.B. 220-21. Booth, 200 to 204. *Lyford* v. *Coward*, 1 Vern. 195. S.C. 2 Ch. Ca. 150. *Knight* v. *Adamson*, 2 Freem. 106.

(74) F.N.B. and Booth, as in n. (73).

(75) *Ib.*

(76) 2 Inst. 399.

(77) F.N.B. 197. Booth, 205.

As the assise of *mort d'ancestor* inquires only of the seizin of the ancestor, and the heirship of the demandant, it was always held, that where lands were devisable by custom, an assise of *mort d'ancestor* did not lie, and it has therefore been thought, that since the statute of wills, 32 H. 8. c. 1. making socage lands devisable, and the statute 12 Car. 2. c. 24. (converting all tenures, a few only excepted, into free and common socage,) no assise of *mort d'ancestor* could be brought, but that in case of abatements recourse must be had to the writs of entry (78).

The correctness of this conclusion would, however, appear very questionable (79), and the distinction is not applicable to copyhold lands, which, it must be recollected, are not within the statute of wills, a will of copyholds operating only as an appointment under the power created by the surrender (80).

The assise of *novel disseizin*, says Mr. Justice Blackstone (81), "is an action of the same nature "with the assise of *mort d'ancestor*, in that the "demandant's possession must be shewn; but it "differs considerably in other points, particularly "in that it recites a complaint by the demandant "of the disseizin committed, in terms of direct

(78) 3 Bl. Com. 187. 2 Watk. on Cop. 36. n. (*g*).

(79) See Booth, 208. n. Bro, Abr. tit. Mordaunçester. Vin. Abr. same tit. Rast. Ent. fo. 129. *Vide* also Co. Litt. 111. a. & b. 1 Leo. 267. ca. 358.

(80) *Ante*, p. 301.

(81) 3 Vol. Com. 187-8.

" averment; whereupon the sheriff is commanded " to re-seize the land, and all the chattels there- " on, and keep the same in his custody till the " arrival of the justices of assise, (which in fact " hath been usually omitted); and in the mean " time to summon a jury to view the premises, " and make recognition of the assise before the " justices. At which time the tenant may plead " either the general issues *nul tort*, *nul disseizin*, " or any special plea. And if, upon the general " issue, the recognitors find an actual seizin in " the demandant, and his subsequent disseizin by " the present tenant, he shall have judgment to " recover his seizin, and damages for the injury " sustained; being the only case in which da- " mages were recoverable in any possessory " action at the common law; the tenant being in " all other cases allowed to retain the interme- " diate profits of the land, to enable him to per- " form the feudal services. But costs and da- " mages were annexed to many other possessory " actions by the statute of Marlberge, 52 Hen. 3. " c. 16. and of Glocester, 6 Edw. 1. c. 1. And " to prevent frequent and vexatious disseizins, it " is enacted by the statute of Merton, 20 Hen. 3. " c. 3. that if a person disseized recover seizin of " the land again by assise of *novel disseizin*, and " be again disseized of the same tenements by " the same disseisor, he shall have a writ of *re-* " *disseizin*, and if he recover therein, the re-dis- " seisor shall be imprisoned; and, by the statute

" of Marlberge, 52 Hen. 3. c. 8. shall also pay a " fine to the King: to which the statute Westm. 2. " 13 Edw. 1. c. 26. hath superadded double da- " mages to the party aggrieved. In like manner " by the same statute of Merton, when any lands " or tenements are recovered by assise of *mort* " *d'ancestor*, or other jury, or any judgment of " the court, if the party be afterwards disseized " by the same person against whom judgment " was obtained, he shall have a writ of *post dis-* " *seizin* against him, which subjects the post dis- " seisor to the same penalties as a re-disseisor."

Limitation of Possessory Actions.

Formerly the limitation was from the date of a particular event, as from the return of King John from Ireland, &c. but now by the statute of 32 Hen. 8. c. 2. all writs grounded on the possession of the demandant himself, must be sued out within 30 years after the disseizin complained of, that being considered a proper restriction in point of period for the term *novel disseizin*.

And the writ in all other possessory actions must be sued out within 50 years after the alleged injury (82); which limitation extends to customary and prescriptive rents, suits, and services (83): but this, says Mr. J. Blackstone, does

(82) 3 Bl. Com. 189. 6 Taunt. 268 in *Romilly* v. *James*. And see 1 Vern. 195 in *Lyford* v. *Coward*.

(83) Mr. J. Blackstone cites for this Berthelet's original edition of the statute, A. D. 1540. and Cay's, Pickering's, and

not extend to services, which, by common possibility, may not happen to become due more than once in the lord's or tenant's life; as fealty, and the like (84).

Remitter.

When the person who hath the right to copyhold lands takes possession by virtue of some subsequent defective title, he is remitted to his prior title, and put in the same condition, as if he had recovered the land by plaint in the nature of a possessory action, in analogy to the law of remitter in freehold cases; so that the possession which he gained by a defective title, is not liable to be overturned by shewing that defect in a plaint, in the nature of a writ of entry, the effect of which would be to drive him to his customary writ of right. See further on the doctrine of Remitter, 11 Mod. 128. 1 Bos. & Pul. 602. 8 Ves. 282.

Of the Copyholder's Writs of Right.

As the *right of property* is not consequent on the *possession*, or on *the right of possession*, it will now be proper to consider of the final remedy by plaints, in the nature of writs of right.

The mere *writ of right*, being in its nature the

Ruffhead's editions, examined with the record, but adds, that Rastall's and other intermediate editions which Sir Edward Coke (2 Inst. 95.) and other subsequent writers have followed, make it only 40 years for rents, &c. 3 Vol. Com. 189. n. (z.)

(84) 3 Vol. Com. 189. cites Co. Litt. 115. And see *Basil's*

highest writ in the law (85), is, (strictly speaking,) applicable only to an estate in fee simple (86).

But even at common law, before the statute *de donis*, if there was a gift to a man and the heirs of his body, and the donee aliened before he had performed the condition of the gift by having issue, and afterwards died without any, the reversioner might have a writ of right called a *formedon* in the *reverter*, to recover the lands, wherein he suggested the gift, his own title to the reversion, minutely derived from the donor, and the failure of issue upon which his reversion took place (87).

And now, since the statute *de donis*, or Westm. 2.

case, 4 Co. 10. b. There is no time of limitation upon rents created by deed, or reserved on a particular estate. 3 Bl. Com. 189. cites 8 Co. 65.

Neither is time a bar *in equity*, as between a trustee and cestui que trust. See 2 Meriv. 360 in *Cholmondeley* & *Clinton*, *Hamond* v. *Hicks*, 1 Vern. 432. Mos. 298-9. But in a constructive trust, long acquiescence will be a bar. *Beckford* & *Wade*, 17 Ves. 97. *Townsend* & *Townsend*, 1 Bro. C.R. 554.

(85) F.N.B. 1.

(86) It is not alone applicable, for if lands escheat to the lord by the death of the copyholder in fee simple, without heirs, the lord may have a writ of escheat in the nature of a writ of right, even if the tenant be disseised, F.N.B. 143-4. Booth, 135. But if tenant in tail die without heirs inheritable, and there is no remainder, the lord in reversion shall not have a writ of escheat, but a *formedon* in the reverter. And if a copyholder in fee, in remainder, or reversion, die without heirs, and afterwards the tenant for life dies, and a stranger enters, I apprehend the lord may have a writ of intrusion, F.N.B. 144.; or may try his title by escheat in ejectment. Booth, 136.

(87) F.N.B. 219. Booth, 154. *Buckmere's* case, 8 Co. 88.

13 Edw. 1. c. 1. a tenant in tail by descent, or in remainder, has a peculiar writ of right, called also a *formedon.* A writ of formedon in the *descender* lieth for the heir in tail, where the tenant in tail aliens the lands entailed, or is disseized of them, and dies: in which action the demandant is bound to state the manner and form of the gift in tail, and to prove himself heir *secundum formam doni* (88): A formedon in the remainder lieth where a gift is made to one for life or in tail, with remainder to another in tail; and he who hath the particular estate dies without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession; in this case the remainder-man, shall have a writ of *formedon* in the *remainder*, wherein the whole form of the gift is stated, and the happening of the event, upon which the remainder depended (89).

This writ, (says Mr. J. Blackstone) (90), is not given in express words by the statute *de donis*, but is founded upon the equity of the statute, and upon this maxim in law, that if any one hath a right to the land, he ought also to have an action to recover it (91).

By the statute of limitation, 21 Jac. 1. c. 16. the writ of *formedon* must be brought within

(88) F.N.B. 212. Booth, 141. *Buckmere's* case, 8 Co. 88. Kitch. 247-8-9.

(89) F.N.B. 217. Booth, 151. *Buckmere's* case, sup. Kitch. 249.

(90) 3 Com. 192.

(91) See Br. Tenant per Copie, pl. 24.

20 years after the title accrues; and as the copyholder, as well as a freeholder, can try his title by the action of ejectment at any time within the period of this limitation, the writ of formedon may be considered an obsolete branch of the law of real actions.

The owners of a particular estate, as in fee tail, for life, in dower (92), or by the curtesy, were without remedy at common law, when barred of entry, or of the right of possession, by recovery against them in a possessory action, and still remain so, after recovery *upon defence*, in the inferior possessory suit (93); but the statute of Westm. 2. 13 Edw. 1. c. 4. gives a new writ for those persons, after their lands have been so recovered against them, *by their own default or non-appearance*, called a *quod ei deforceat;* which restores the right to him, who has been deforced by his own default (94).

When one coparcener deforces the other by usurping the sole possession, the party ousted may have a writ of right, *de rationabili parte* (95),

(92) But a dowress it must be recollected, has her writ of right of dower in freehold cases, extending either to a part or the whole, and therefore may have a plaint in nature thereof in the manor Court, when intitled to freebench, and the homage to set out the same, *Ante*, p. 548.

(93) Hence it is, that a common recovery on a writ of entry in the post, had by default of the vouchee of tenant in tail, upon defence, is now the usual mode of barring an estate tail, 4 Co. 23. a. (3).

(94) F.N.B. 8, 155. Booth, 253. 3 Bl. Com. 193.

(95) F.N.B. 9.

which may be grounded on the seizin of the ancestor at any time during his life; whereas in the possessory remedy of a *nuper obiit*, he must be seized at the time of his death.

The several abovementioned remedies in freehold cases, are equally open to a copyholder, whether of inheritance, in fee simple, or fee tail, or having a particular estate only, as for life, or years, in dower, or by the curtesy, who by plaint in the court of the manor, analogous to, and corresponding with, the several writs of right at common law, may be restored to the possession, and confirmed in the property of the copyhold tenement, of which he has been unjustly deprived (96).

But as the possession may, in freehold cases, be recovered in a more easy and expeditious manner, by a possessory action, this final remedy is seldom resorted to, when the claimant is not driven to it by length of adverse possession; this distinction does not, however, seem to hold in copyhold cases, where the proceedings in a writ of right, are by no means so complicated and abstruse as is generally supposed, which will be seen by reference to the Appendix.

And where the mise is joined upon the mere right, there needs little of special pleading, as all

(96) Whether a copyhold tenant has any remedy by writ of right or plaint in nature thereof, in case of ouster by the lord, see Br. Tenant per copie, pl. 10. 6 Vin. Cop. (L. d.) pl. 1. *Ante*, pp. 369, 542, n. (34), 544, n. (42).

or most of such matter (except a collateral warranty) may then be given in evidence (97).

But precisely the same accuracy would seem to be requisite in the pleadings in copyhold cases, as in freehold (98), the several writs of right, and, as a consequence, plaints in nature thereof, being much discouraged by the courts, and there are very few cases in which the demandant will be permitted to amend (99).

(97) Booth, 112, cites Br. Droit 8. And see 3 Wils. 420 in *Tissen* v. *Clarke*.

(98) If the demandant in deducing his title through a female describe her as "sister and heir of J.S.," and it appears upon the face of the count, that J.S. left a son who survived his aunt, it is fatal, although it should also appear that upon failure of issue of the son, the issue of the sister of J.S. became his heirs. *Slade et ux.* v. *Dowland.* 2 Bos. & Pul. 570. And in the count of a writ of right, it is not sufficient to say that the lands descended to four women as nieces and co-heirs of J.S. without shewing how they were nieces. 3 Bos. and Pul. 453, in *Dumsday* v. *Hughes and another.*

(99) In the case of *Charlwood* v. *Morgan et ux.* 1 N.R. 66, Mr. Just. Heath said, "in *Dumsday* v. *Hughes*, [*sup.*] we thought that writs of right ought not to be encouraged, and that the least slip was fatal to the demandant. We did not choose to say at that time, that in no case whatever would an amendment be allowed, since a fit case might by possibility be brought before us. The mistake here is a common mistake, and not such as entitles the demandant to any favour."

And in a subsequent case, (*Baylis* v. *Manning*, 1 N.R. 233,) the court refused to permit the demandant to amend his count by introducing an additional step in the descent, though it was sworn, that the mistake had arisen from the demandant having been misinformed in the country, and that he would be barred by the stat. of limitations, unless the amendment were allowed. Vide also *Maidment* &

It is to be recollected, that the writ of right, which is the only remedy when the right of possession is lost by length of time, or by judgment against the true owner in an inferior suit, will also lie concurrently with all other real actions, as well as after them.

The demandant in the writ of right, must allege in his count some seizin of the lands in himself, or in some person under whom he claims, and that his ancestor was seized *of right*, as well as that he was seized in his demesne as of fee (100), and then deduce the right to himself (101); to which the tenant may answer by denying the demandant's right, and averring that he has more right to hold the lands, than the demandant has to demand them: and this right of the tenant being shewn, it then puts the demandant upon the proof of his title; in which, if he fail, or if the tenant hath shewn a better, the demandant and his heirs are perpetually barred of their claim; but if he can make it appear that his right is superior to the tenant's, he shall recover the land against the tenant, and his heirs for ever (102).

Jukes, 2 N.R. 429. Neither will the court permit the demandant in a writ of right to discontinue. *Maidment & Jukes*, sup.

(100) *Slade et ux.* v. *Dowland*, in false judgment. 2 Bos. & Pul. 570. S.C. in error. 5 East, 272. 1 Smith, 543.

(101) Booth, 113. And he must shew an actual seizin, by taking the esplees, either in himself or the ancestor from whom he claims. Ib. And see 1 H. Bl. 1. in *Dally* v. *King*.

(102) F.N.B. 5. (M.) 3 Bl. Com. 195-6; see further as to

In real actions the estate sought to be recovered, must be described with great precision, the word *tenement*, therefore, is too general and uncertain; and a judgment in dower for *tenements* was reversed for that reason, though the tenant confessed the action, and the sheriff had delivered seizin (103).

After issue is once joined in a writ of right, the judgment shall be final, and the recovery may be pleaded in bar of any other claim; but if one lose by default before issue joined, yet he may have a writ of right against him who recovereth (104).

A writ of false judgment does not lie of copyholds, but the party wronged is to be relieved by petition to the lord in the nature of a bill in Chancery (105); and a court of equity will compel the lord to do justice, in case of an error in any adver-

pleadings in a writ of right, Booth, 112, *et seq. Ib.* 87. *et seq.* F.N.B. 1 to 6. Bul. N.P. 115-16, *Slade et Ux.* v. *Dowland, sup.* Post tit. 'Pleading, &c.'

(103) 2 Lord Raym. 1384. 1 Str. 625. But in a late case *in ejectment*, for a messuage and *tenement*, the court gave leave to enter the verdict according to the Judge's notes for the messuage *only* (pending the rule to arrest the judgment), without obliging the lessor of the plaintiff to release the damages. *Goodtitle* v. *Otway*, 8 East, 357.

(104) F.N.B. 6. (N.) Kitch. 151-2. cites 26 H. 8. 10. 12 H. 7. 10. 3 Bl. Com. 194. Co. Litt. 157.

(105) Co. Cop. s. 51. Tr. 118. Co. Litt. 60. a. F.N.B. 18. (H.) Winch. 8. *Brown's* case, 4 Co. 21. b. Mo. 68-9. pl. 185. *Edwards's* case, Lane, 98. 14 H. 4. 34. Kitch. 158 cites 7 E. 4. 19. *Ante*, p. 542. n. 34.

sary proceedings, which I must presume to mean, in case of any unconscientious matter, whereof a court of equity ought to take cognizance (106).

Where one recovered in the lord's court by plaint in the nature of a writ of right, it was moved in the court of Common Pleas, that a precept might be awarded to put him who recovered, in possession, by the *posse manerii*, as with the *posse comitatus* at common law, but it was resolved, that force was not justifiable, except by mandate out of the King's courts (107).

The seizin in a writ of right must, by the statute of 32 H. 8. c. 2., be alleged within 60 years, if the action is upon the seizin of the ancestor or predecessor (108), and by the same statute, no person shall have any action for lands upon his own seizin or possession, above 30 years next

(106) *Ash* v. *Rogle and the Dean and Chapter of St. Pauls*, 1 Vern. 367. Sho. Par. Ca. 67. *Christian* v. *Corren*, 1 P.W. 330. *Patteshul's* case, Hil. 8 Jac. Scac. 4 Vin. Abr. p. 385. S. C. cited in *Edward's* case, ubi sup. And see 6 Vin. Abr. p. 167. *Bell* v. *Cundall*, Amb. 101. *Ante*, p. 78.

(107) 4 Leo. 87. ca. 183. But if the tenants of the manor would not be justified in using force, I apprehend the Court of King's Bench would enforce the execution of the precept to the bailiff of the manor court, to put the demandant into possession.

(108) It would seem that proof of possession and pernancy of the rents, is *prima facie* evidence of a seizin in fee, but it may be rebutted by stronger circumstantial evidence: so the proof of above 40 years subsequent possession by a daughter, while a son and heir lived near, was deemed sufficient presumptive evidence, that the first possessor had only a particular estate. *Jayne* v. *Price*, 5 Taunt. 326.

before the teste of the original writ, which therefore, by analogy, are the periods of limitation for customary plaints in the nature of the several writs of right; but as the true owner is not barred by length of possession, except it be adverse, it follows, that an uninterrupted possession for 60 years, is not always a bar in copyhold, any more than in freehold cases, as the copyholder might not be intitled to enter within that period, by reason of a subsisting estate in tail, or for life or years; in which case he might have a plaint of his own possession, at any time within 30 years after his right of entry accrued (109).

OF EVIDENCE.

We will now turn our consideration, to the evidence which the courts will admit or reject in copyhold cases, as well where the title comes in question, as where it does not.

But as the documentary evidence of title to be furnished by a vendor to a purchaser, under a contract for sale of copyholds, is the subject of frequent doubt and controversy, I shall first venture to lay before my readers, the opinion I have formed on this practical rule.

(109) *Bevil's* case, 4 Co. 11. b. 12. a. Booth, 2. n. (b.) 1 Bulst. 162. 3 Bl. Com. 196. n. (1). *Taylor* v. *Horde*, 1 Burr. 60. Cowp. 689. 6 Bro. P.C. 633. 2 Saund. [by Serj. Williams] p. 44. N. 4.

I apprehend that, unless there be a special stipulation to the contrary, the vendor of copyholds is bound, at his own expense, to produce to a purchaser the originals, or authenticated copies, of such documents as are comprised in the abstract of title, *whether on record or not*, and must therefore obtain further certified copies of any surrenders, admissions, or other acts entered on the court rolls, if the copies originally made out by the steward are lost; and that the vendor cannot insist on the purchaser's tracing the title on the rolls of the manor, or any public records (110): and I also conceive, that it is an established practice in copyhold as well as in freehold cases, that such original instruments or authenticated copies, are to be delivered up to the purchaser, unless the vendor retains, or has sold to another, an estate of greater value held under the same title; and in that case, that the purchaser, if it be not provided against by special contract, is

(110) Sugden's Vend. and Purch. 389 [5th ed.], cites *Berry* v. *Young*, 2 Esp. Ca. 640. n.

The late Master of the Rolls seems to have doubted, whether a purchaser of copyholds must be presumed to have notice of every entry on the Court Rolls. *Hansard* v. *Hardy*, 18 Ves. 462. But the present V. C. held, in the case of *Pearce* v. *Newlyn*, 3 Madd. 188, that the defendant (the purchaser), ought to be presumed to have known the contents of the Court Rolls as far back as an inspection was necessary for the security of the title, and that 13 years non-claim since the plaintiff became adult, was no bar; and decreed an account of the timber cut, and of the rents for six years past. Vide also *Newman* v. *Kent*, 1 Meriv. 240.

stamp would be always evaded. But lord Ellenborough, C. J. in delivering the opinion of the court, held, that the statute not having required a stamp upon the original court roll itself, but only on the copy, it could not be deemed an evasion, and that it is not necessary for the tenant to produce his copy, if he chooses to risk the evidence of his title in not taking a copy. And his lordship added, "how can a copy be evidence, unless the original be evidence?"

And it was long since held that a copy of a court roll under the steward's hand, was good evidence of the copyholder's estate (119).

In the case of the *Dean and Chapter of Ely* v. *Stewart* (120), Lord Hardwicke ruled, that where the admittance of a copyholder was of 30 years standing, a copy of such admittance might be read in evidence, and that it was not

(119) *Snow* v. *Cutler & Stanly*, 1 Keb. 567. *Lee* v. *Boothby*, *ib.* 720. [N. B. In this case the steward was counsel for the lord as plaintiff, Scroggs, 97.] In *Pilkington* v. *Bagshaw*, Sty. 450. Roll, C. J. said, "if copies of court rolls be "shewed to prove a customary "estate, the enjoyment of such "estate must also be proved, "otherwise the proof is not "good;" and see *Rogers and others* v. *Allen*, 1 Campb. 309. where old licenses on the court rolls, granted in consideration of certain rents, were deemed evidence to prove a prescriptive right of fishery, as connected with payments in later times under licenses of the same kind, or with the exercise of other acts of ownership by the lords of the manor.

But entries of presentments in the books of a manor, are not evidence of acts of ownership by the lord. *Irwin & Simpson*, 7 Bro. P. C. 317.

(120) 2 Atk. 45.

necessary that it should be signed by the steward of the court.

Yet in the report in Fortescue (121), of the *Duke of Somerset* & *France*, there is a note, that an admission under the hand of the steward, though above 40 years old, was rejected in evidence, because they could not prove the steward's hand.

And as the steward of a customary court does not stand in the situation of a public officer, it would certainly appear to be essential that his hand writing should be proved, to establish the authenticity of any copy of Court Rolls (122).

A custumary of a manor of antiquity, and handed down from steward to steward, although not signed by any one, has been received as good evidence to prove the course of descent (123).

In a dispute between the lord and a devisee of a copyholder, Holt, C. J. held, that the recital of a will in the copy of admission, was good evidence of the devise against the lord or any stranger, but that if the dispute had been between the heir and the devisee, the will itself ought to have been produced; and he ruled, that the

(121) P. 43.

(122) 2 Bac. Abr. 611. It should seem that an examined copy of a court roll would be good evidence, if sworn to be a true one. 2 Bac. Abr. 632, cites Comb. 337. 12 Mod. 24. And see *Doe* d. *Churchwardens of Croydon* v. *Cook*, 5 Esp. Rep. 221. Mann. Dig. 94.

(123) *Denn* d. *Goodwin and Wragg et ux.* v. *Spray*, 1 T. R. 466. *Roe* v. *Parker*, 5 T.R. 30.

rough draft of the steward of the manor, of the admittance, was admissible evidence (124).

In an action of ejectment by a devisee of copyhold property, the claimant must prove not only his own admittance, and the will under which he claims (125), but the admittance of the testator (126); and likewise his surrender to will, if the will were made prior to the Stat. 55 Geo. 3. c. 192.

And proof of the admission of a person of the name of the lessor of the plaintiff in ejectment, by production of the Court Rolls, is not *alone* sufficient, but evidence of the lessor's identity is requisite (127).

As the admittance of a tenant for life is the admittance of all in remainder (128), a person claiming under a remainder-man, only need prove the admittance of the tenant for life (129).

Where the title does not come in question, it is not necessary to give evidence of the admittance or grant, and consequently not in replevin (130).

Evidence of the customs in one manor is not allowed to prove a custom in another ma-

(124) 1 Lord Raym. 735. See also *Jenkins* v. *Barker*, per Tracy, 1705. 2 Bac. Abr. 632.

(125) *Jenkins* v. *Barker*, sup. *Roe and Hicks*, 2 Wils. 15, 16.

(126) *Wilson* v. *Weddell*, Yelv. 145.

(127) *Doe* d. *Hanson and others* v. *Smith and another*, 1 Campb. 196.

(128) *Ante*, p. 353.

(129) 2 Phillips' Law of Evid. 201.

(130) *Adams* v. *Cross*, 2 Vent. 181.

nor (131); except where there is a probable ground for similitude, as in the three northern counties, Cumberland, Westmoreland and Northumberland, in the tenant right estates; and there the custom of neighbouring manors has been deemed admissible evidence (132).

And in the *Dean and Chapter of Ely* v. *Warren* (133), Lord Hardwicke held, that although the evidence of neighbouring manors, should not generally be admitted to shew the custom of another manor, yet that the rule was not so universal as not to be varied in some instances; as in mine countries, the courts have admitted evidence with regard to profits of mines out of other manors, where there was a similitude to explain or corroborate the custom of the manor in question: and his lordship permitted evidence to be read, which went to establish a right in the tenants, to common of turbary.

It has been ruled, that a tenant of the manor not claiming by a custom, may give evidence to prove the custom, but that a tenant claiming by such custom, cannot be a witness (134).

(131) *Duke of Somerset* v. *France et al.* 1 Stra. 654. S.C. Fortesc. 41. and see *Dean and Chapter of Ely* v. *Warren*, infra, Cowp. 807. *Roe* v. *Parker*, 5 T.R. 30.

(132) *Roe* v. *Parker*, sup. *Champian* & *Atkinson*, 3 Keb. 90. In this case it was held that the steward, though he had a fee for the admission, might be a witness.

(133) 2 Atk. 189.

(134) 12 Mod. 24. And as to the admissibility of the evidence of the lord for a copyholder, see *Garrard* v. *Lister*, 1 Keb. 15.

And in the above case of *The Duke of Somerset and France*, the lords of other manors were not allowed as witnesses, to prove a custom as to fines payable in the particular manor, but the recent submission of several tenants to such payments, was deemed admissible evidence.

It has been very recently adjudged, in the case of *Freeman* v. *Phillipps and another* (135), that an alleged custom may be disproved by depositions, in a suit instituted against a former lord, by a person claiming to be admitted under a custom at variance with the one so alleged to prevail in the manor; which depositions were there made by the witnesses of the claimant: and it was also held that such depositions, if only admissible as declarations of persons deceased, could not be rejected as being made *post litem motam*, the same custom not being in controversy in the former suit. This question was brought before the Court of Kings Bench upon a rule for a new trial in an action on the case by a copyholder against the lord of a manor and his steward, for a false return to a mandamus directing the defendants to hold a court, and accept from the plaintiff (the second surviving life of two, and having named one M. L. in place of the first) a surrender, &c. and re-grant, &c. under a custom for the second life in copyholds (usually granted for two lives,) if he survived the first, to add another life in place of the first, and sur-

(135) 4 Mau. & Selw. 486.

render to the lord or his steward in court such copyhold, for the purpose of having a re-grant thereof for his life and such other life named, and for the lord, or his steward, to accept and re-grant the same as aforesaid, the surviving life paying by way of fine, *such sum of money, as by the jury or homage of the said court might be assessed or ascertained to be equal to two years' improved value of the tenement so surrendered and re-granted.* The defendants made a return to the mandamus denying such custom, and pleaded not guilty.

At the trial before Graham, B. at Leicester, the above evidence was admitted for the purpose of establishing a custom for any copyhold tenant for life or lives to change his lives, or if any of his lives were dead, to fill up the copy by adding or naming one or two lives to the life in being, for which the copyhold tenant should pay to the lord *a reasonable fine to be set by the lord or his steward;* and there was a verdict for the defendants.

The court thought that the evidence was properly admitted, and discharged the rule for a new trial. Lord Ellenborough said, that in all cases of customs, such as the custom to grind at mills, as in the case of *Settle Mill* (136), and various other mills, depositions of the above nature had

(136) See *Cort* v. *Birkbeck*, Doug. 219. Vide also *Nichols* v. *Parker*, 14 East, 331. (n.) *Weeks* v. *Sparke*, 1 Man. & Selw. 679.

ever been received; that he had heard them read twenty or thirty times on the circuit he used to go, without objection, and he remembered particularly in the case of Leeds Mill, that they were admitted as the depositions of persons standing in *pari jure*. And the court further observed, in answer to an objection made to the evidence as being *res inter alios acta*, that the plaintiff made common claim with other copyholds granted for two lives, by which he was intitled to go into the question of usage, as it applied to all the like tenements within the manor, and that on the other hand he exposed his claim to be met by evidence relating to any other tenement within the manor, standing in the same situation as his own. [See further as to depositions and declarations being read in evidence, Bull. N. P. 239 et seq. *Tooker* v. *Duke of Beaufort*, 1 Burr. 146. 1 Phill. Law of Evid. 286, 209, 290. 2 Ib. 188-9. *Berkeley Peerage* case, 2 Selw. N. P. 684. 4 Camb. 401. 1 Phill. Ev. 189 n. 230 n. *Rex* v. *Cotton*, 3 Campb. 444].

We have already seen, that evidence of enjoyment will be received, to control the operation of ancient admissions (137): And that although possession and pernancy of the rents, is *prima*

(137) *Stammers* v. *Dixon*, 7 East, 200. *Ante*, p. 184. It was held by the Court of C. B. in *Biddulph* v. *Ather*, that two allowances in eyre and a judgment in trespass 400 years back were not conclusive evidence against usage for near a century. 2 Wils. 23.

facie evidence of a seizin in fee, yet it may be rebutted by stronger evidence (138).

And we have also seen, that a general reputation extending a recorded custom, is evidence to be left to a jury (139), and which decision denied the doctrine of Lord Coke in *Ratcliffe* and *Chaplin* (140), that to prove a custom it must be shewn by proceedings to have been put in use.

So an entry on the rolls of a manor, stating the mode of descent, has been deemed admissible evidence of the custom, though no instances could be proved of any persons having taken according to it (141).

A single instance will under some circumstances, be sufficient evidence to prove a custom, as in *Roe* d. *Bennett* d. *Jeffery* (142), where only one recorded surrender in fee by tenant in tail of a copyhold estate, was admitted as evidence to prove a custom, to bar intails by surrender, although there was one instance of a recovery in the same manor.

And if a custom be proved by entries on the

(138) *Jayne* v. *Price*, 5 Taunt. 326. *Ante*, p. 563. n. 108.

(139) *Doe* d. *Foster and another* v. *Sisson*, 12 East, 62. *Ante*, p. 35. But see 12 Vin. tit. 'Evidence.' (T. b. 25.) pl. 4.

Reputation alone would also seem to be admissible evidence to prove the existence of a manor. *Ante*, p. 9. Vide also *Steel* v. *Prickett*, 2 Stark. 466. *Smith* v. *Smith*, 2 Price 111. *Curson* v. *Lomax*, 5 Esp. 60.

(140) 4 Leo. 242.

(141) *Roe* d. *Bebee* v. *Parker*, 5 Tr. 26.

(142) 2 Mau. and Selw. 92. And see *Doe* d. *Mason* v. *Mason*, 3 Wils. 63. *Ante*, p.p. 32-5, 74.

rolls, for a widow to hold the estate during her chaste viduity, it is sufficient evidence of the condition, to ground an ejectment against her by the remainder-man, as for a forfeiture on incontinence, though there is no instance of such a forfeiture having been enforced (143).

In an ejectment against the widow of a copyholder, she justified because the wife of a copyholder by the custom *ought to have for life:* The custom was traversed, and it was held, that evidence by the defendant, *of a widow's estate only*, did not maintain the issue (144).

A casual destruction of deeds will not induce either a court of law or equity, to favour the presumption of evidence, but if a man destroy a court roll, or copy, designed to be evidence against himself, the courts will presume every thing capable of being presumed (145).

In *Chapman* v. *Cowlan* (146), which was an action by a copyholder against a freeholder, for overstocking the common, a parchment writing from amongst the muniments of the manor dated in 1698, and purporting to be signed by many copyholders, stating an unlimited right of common, and agreeing to a restricted manner of stocking it; and another parchment writing of

(143) *Doe* d. *Askew and another* v. *Askew*, 10 East, 520. *Ante*, pp. 86, n. 82, 527, n. 127.

(144) *Linsey* v. *Dixon*, Dy. 192. pl. 23. When customs are to be construed strictly and when not so, see ante, p. 34.

(145) 1 Lord Raym. 731. *Cookes* v. *Hellier*, 1 Ves. 235. Hob. 109.

(146) 13 East, 10.

the same sort dated in 1717, were admitted as evidence of the reputation of the prescriptive right of common at that period, against the restricted right set up by the plaintiff.

And in *Sir J. Bridgman* v. *Jennings* (147), Holt C. J. ruled, that if A. seized of the manors of B. and C., cause a survey to be taken of B., which manor is afterwards conveyed to E, and, long subsequently, disputes arise between the lords of B. and C. about their boundaries, this old survey may be given in evidence, contra if the two manors had not been in the hands of the same person, at the time the survey was taken.

This distinction was also recognised in a case at nisi prius in Middlesex before Pratt, C. J. (148), where the question, in ejectment, being parcel or not parcel, a survey was offered in evidence on the plaintiff's side, which was taken by one under whom the lessor claimed, wherein the lands in question were included; and the court rejected it as being an act to which the defendants were not privy, and consequently not bound, observing, that to receive it as evidence would be dangerous, and tend to encourage people to take more than their own into a survey (149).

(147) 1 Lord Raym. 734.

(148) Anon. 1 Stra. 95.

(149) And see Cary's Rep. 33-4.

It was held by Mr. B. Wood, in *Humble* v. *Hunt and others*, 1 Holt, 602, that a book in which copies were made of counterparts of leases granted by the Bishop of Durham, which enrolment book was kept in the office of the Bishop's auditor, was a public muniment, and to be received in

In an assize if the tenant plead *nul tort nul disseisin*, he cannot give in evidence a release after the disseizin; but a release before the disseizin he may; for then there is no disseizin upon the matter (150).

And if in a writ of right, the tenant join the mise upon the mere right, he cannot give in evidence a collateral warranty; for he hath not any right by it, and therefore it ought to have been pleaded (151).

OF PLEADING, PRESCRIPTION, &c.

PLEADING. As a copyhold cannot be created in time of memory, it must always be pleaded to have been demisable by copy of court roll, time out of mind, and it is not sufficient to state that it is held, *ad voluntatem domini secundum consuetudinem manerii* (152).

But it is indispensably necessary in pleading

evidence to sustain the claims of a lessee, the counterpart being lost, and the original not produced.

(150) Co. Litt. 283. a.

(151) *Ib.* ante, p. 559, 560.

(152) Co. Litt. 58. b. *Murrel & Smith*, 4 Co. 24. b. *French's* case, *ib.* 31. *Roe* d. *Newman* v. *Newman*, 2 Wils. 125. 2 Dougl. 720. *Gregory* v. *Cosens*, Bendl. 197. Chitty's Plead. 2 Vol. 247.

It should also be shewn that the estate created, is allowed by the custom of the manor. The *Archb. of Canterbury's* case. Sav. 131; but this does not seem necessary in a claim of common, *Hoskins* v. *Robins*, 1 Saund. 326: And as the greater estate includes the less, the frequent addition of the words *in tail, for life* &c. in pleading, also seems unnecessary in copyholds of inheritance. 1 Saund. Rep. by Serj. Williams, p. 348. n. 8. *Ante*, p. 119, 120.

in copyhold tenure, to state that the lands are held *at the will of the lord*, as they might by implication not be of copyhold tenure, strictly speaking, and yet be held according to the custom of the manor (153).

And in an action on the case in the court of Common Pleas, for inclosing common *per quod in tam amplo, &c.* and wherein the plaintiff had a verdict, the court, upon a motion in arrest of judgment, held that the declaration was bad, for want of the words *ad voluntatem domini*, and gave judgment for the defendant. A writ of error was brought in B. R., when that court fully sanctioned the rule of pleading as laid down in the Common Pleas, but nevertheless reversed the judgment for the defendant, the fault in the declaration being helped by the verdict finding the estate to be copyhold (154).

(153) *Rogers* v. *Bradly*, 2 Vent. 143. *Elkin* v. *Wastell*, 3 Bulst. 230. *Gale* v. *Noble*, Carth. 432. *Hughes* v. *Harrys*, Cro. Car. 229. *Hill* v. *Bolton et al.*, 2 Lutw. 1171. *Follet* v. *Troake*, 2 Lord Raym. 1186. Co. Litt. 58. a. n. 1. Vide also *Hutchison* v. *Jackson* & *Dawson*, Lutw. 1324, where in trespass for taking the plaintiff's cattle in G. the defendant pleaded, that the Earl of Sussex was seised in fee of the manor of S. of which the lands &c. were parcel, and descendible from ancestor to heir in a course of succession called *Tenant Right*, which on demurrer was held to be repugnant to the previous allegation. See the pleadings in this case Lex. Man. App. pl. 28. Vide also 2 Vol. Chitty's Plead. 249.

(154) *Crowther* v. *Oldfield*, 1 Lutw. 125. S. C. in error, 2 Lord Raym. 1225. S. C. 1 Salk. 170, 364. S. C. 6 Mod. 19. S. C. Holt. 146. And see the pleadings in this case, Lex. Man. Append. pl. 29.

When copyholds are held of a manor which is ancient demesne, it is also very essential that the cophold tenure should be pleaded, for if pleaded that they are held of A. of his manor of B., which is ancient demesne, or that they are *parcel* of the manor, it must be understood that the lands are part of the demesnes, and therefore together with the manor impleadable only at common law (155).

Although the proper mode of pleading by copyholders, is by way of custom (156), yet a copyholder in A. who has common in B. must prescribe for it in the *que estate* of the lord, as common out of the manor belongs to the land and not to the estate; and if he enfranchise he must plead that up to such a time the lord had common for him and his customary tenants, and that at that time the lord enfranchised the tenement and conveyed it to the defendant, and that since that time, the feoffee and his tenants have had the right of common (157).

(155) *Brittel* v. *Bade*, 1 Lord Raym. 43. S.C. 1 Salk. 186. *Doe* d. *Rust* v. *Roe*, 2 Burr. 1046. *Kite* v. *Laury*, 3 Salk. 34. *Baker* v. *Wich*, or *Parker* v. *Winch*. 1 Salk. 56. 12 Mod. 13. Comb. 186. And see *Smith* v. *Frampton*, 3 Lev. 405. But in a replevin, Rolle, C. J. held that, after imparlance, the defendant could not plead ancient demesne, as it admitted the jurisdiction of the court, *Vincent* v. *Wallis*, Str. 197.

(156) *Crowther* & *Oldfield*, *ante*, (n. 154). *Thompson* v. *Roberts*, Fortesc. 340. *Kenchin* v. *Knight*, 1 Wils. 254. S.C. 1 Sir W. Bl. 49. and see *Nicholson* v. *Smith*, Lutw. 126. 1 Vent. 97.

(157) *Barwick* v. *Matthews*, 5 Taunt. 365. S.C. 1 Marsh. 50.

It has been held, that a plea, justifying under a custom for the tenants of a *particular* copyhold estate to cut turf &c., is not supported by evidence of a custom embracing the copyholders of the manor *generally* (158).

A copyholder in pleading may allege any admittance, as well upon a descent as upon a surrender, *as a grant*, or allege the admittance of his ancestor, as a grant, and shew the descent to him, and that he entered, which is good without any admittance; but it is not sufficient for the heir to plead, that his father was seized in fee by copy of court roll, at the will of the lord according to the custom, and that he died seized, and the estate descended to him (159).

In the case of *Phillips* v. *Fielding* (160), which was an action of assumpsit in the Court of Common Pleas against the vendee of copyholds, for not performing his contract and paying the purchase money, it was held that the averment by the plaintiff in his declaration, that he had always

(158) *Wilson* v. *Page*, 4 Esp. 71. Mann. Dig. 84.

(159) See the third resolution in *Brown's* case, 4 Co. 22. b. Co. Cop. s. 41. Tr. 95-6. *Vide* also *Robinson* v. *Smith*, 4 Mod. 346. *Fisher* v. *Wigg*, 12 Mod. 297. *Pyster* v. *Hemling*, Cro. Jac. 103. *Shepheard's* case, Cro. Car. 190. *Wade* v. *Baker* & *Cole*, 1 Lord Raym. 130. And where the title does not come in question, as in replevin, it is not necessary to shew an admittance, *Adams* v. *Cross*, 2 Vent. 182. *Wade* v. *Baker* & *Cole*, *sup. Ante*, p. 570.

(160) 2 H. Bl. 128. And see *Edwards* v. *Heather*, Sel. Ca. Ch. Temp. King. 3.

been ready and willing, and had frequently offered to make a good title, and to make a proper surrender, was insufficient; and that he ought to have averred a sufficient performance of his part of the agreement, by stating an actual surrender to the defendant; or a tender and refusal, and to have shewn what title he had to the estate.

It, however, is not necessary in such a case to detail the nature of the title, but is sufficient to aver that the plaintiff was seised in fee, and that the title was made good, perfect, and satisfactory, and that he had always been ready and willing, and had offered to convey the estate to the defendant (161).

Upon trespass in a grant for lives in reversion, it was pleaded, that the grant was "*tenementa* "*prædicta, per nomen* of a messuage which A. P. "held for life," and it was held to be pleaded as a grant in possession, and not in reversion, and incurable (162).

Where a defendant in an action of trespass by a copyholder, for entering his copyhold and boring for coals, justified under the lord of the manor, as seized in fee of the veins of coals under the copyhold tenement, *with liberty of boring*, &c.,

(161) *Martin and others* v. *Smith*, 6 East, 555. 2 Smith's Rep. 543. See also Sugden's Vendor & Purch. c. 4. s. 3. "on the remedies for a breach "of contract," and the cases there cited to shew that the purchaser, and not the vendor, ought to prepare and tender the conveyance, [5th Ed. p. 215].

[162] *Gay* v. *Kay*, Cro. Eliz. 661.

it was held not to be sufficient for the plaintiff to reply, that such veins, &c. had immemorially been parcel of the manor and demised, &c. without reservation of the coal, unless he also traversed the liberty of working the mines; and upon the court's observing that the replications were bad on that ground, and that the plaintiff ought to have leave to amend, or that there should be judgment for the defendant, the plaintiff's counsel prayed leave to amend his replications, which was granted (163).

The defendant in an ejectment pleaded a surrender of a copyhold by the hand of the steward, and issue was joined *absque hoc*, that he was steward; and the court held this no issue, for that the traverse ought to be general, that he did not surrender, as the surrender was void if he were not steward: So of a surrender pleaded into the hands of the tenants of the manor, and it was ruled, that where issue is taken upon a surrender, it shall be tried where it was alleged to be done, and not where the manor is (164).

If a vendee of copyholds who takes a bond for quiet enjoyment, by his own act occasions a forfeiture, the obligor is discharged from the condition: therefore in debt on bond for surrendering

(163) *Bourne* v. *Taylor*, 10 East 189.

(164) *Wood* v. *Butts*, Cro. Eliz. 260. See Co. Cop. s. 46. Tr. 108. In pleading a grant of copyholds it is necessary to state the steward's name, *Brown* v. *Foster*, Cro. Eliz. 392. *The Archb. of Canterbury's* case, Sav. 131. Chitty's Pleading, 2 Vol. 248, 269.

copyholds and permitting the purchaser to enjoy without interruption of any one, the defendant pleaded performance, and that the plaintiff continued in possession for a certain time, and then the lord for rent in arrear entered according to the custom, for a forfeiture; and the court held it was a good plea (165).

In an action upon the case for not performing a promise to join in a surrender of copyholds, the plaintiff must allege in his declaration, that he made a request to the defendant to join in the surrender; and when the plaintiff assigns a particular mode of surrender, viz. into the hands of two tenants, he should shew that there is such a custom; or a demurrer will hold (166).

But a general custom of the realm, as for a copyholder to surrender in court, or out of court, into the hands of the lord, need not be alleged (167).

Nor is it necessary under a covenant to surrender copyhold lands, for the purchaser to shew a court to have been holden, as the vendor ought to procure a court to be holden (168).

(165) Dy. 30. a. In debt upon bond for quiet enjoyment of copyholds, the plaintiff must shew that he was evicted by lawful title, *Hamond* v. *Dod*, Cro. Car. 5.

(166) *Freeborn* v. *Purchase*, Sty. 107. And see *Turner* v. *Beany*, 1 Mod. 61. *Ante*, p. 140.

(167) Co. Litt. 59. a.

(168) Vide *Fletcher* v. *Pynfett*, Cro. Jac. 102.

See further as to the form and manner of pleading in copyhold cases. Chitty's Pleading, 2 Vol. 38, 47, 247, &c. 269, &c. 547.

The case of *Duberley* v. *Page and another* (169), (which was an action for breaking the plaintiff's close, then lately part of the waste of a manor,) has established, that a plaintiff is intitled to the costs of pleadings, where one of several pleas pleaded by the defendant, is adjudged bad on demurrer, although the defendant has a verdict on the issues joined on the other pleas, and though it appears on the whole of the record, that the plaintiff has no cause of action. The court observed, that the costs of double pleading, were by the statute 4 Anne, c. 16. left at their discretion, but that the quantum only, and not the allowance of costs at all, was in the discretion of the court; that the demurrer was in consequence of the bad plea by the defendants, and as the plaintiff had judgment on that plea, he was entitled to the costs of it.

It would not be perfectly consistent with the object of this treatise, either totally to pass over, or to go very much into detail on the subject of pleadings in customary plaints, in the nature of possessory actions and writs of right.

I would lay it down as a general rule, that the forms and decisions which will be found in the books as applicable to freehold cases, are to be the guide of the steward in all similar litigations with respect to copyhold property. Something has been already said on this head in treating of the nature and redress of REAL INJURIES, and

(169) 2 T.R. 391.

under the section of EVIDENCE. In circumstances of peculiar difficulty, the steward may find it necessary to have recourse to the several books of entries, but he will in almost every instance be relieved from embarrassment, by the analogous forms and rules in freehold cases, amply furnished in *Fitzherbert's Natura Brevium* and *Booth's Real Actions*. Much useful learning will also be found on this abstruse subject in the very interesting case of *Dowland* v. *Slade and Wife*, in error from the court of Common Pleas (170), on reversal of the judgment of the court below, reported by Mr. East, 5 vol. 272, and wherein the court of King's Bench ruled, that the demandant in a *Writ of Right*, must allege the seizin of the ancestor to be not only *ut de feodo*, but also *de jure* (171).

The reader is likewise referred to the third volume of Mr. Chitty's Treatise on Pleading, p. 593 to p. 668.

PRESCRIPTION. A copyholder as against all strangers, must prescribe by way of custom through the lord (172), that is, that the lord and

(170) 2 Bos. & Pul. 570.

(171) *Ante*, p. 561.

(172) *Sharp* v. *Lowther*, Tr. 9 Geo. 2. Rep. Temp. Hardw. 293. *Thompson* v. *Roberts*, Fortesc. 339. Chitty's Pleading, 1 Vol. 578. 2 Vol. 592. Supp. Vin. Cop. (P. 2.) pl. 1, 2. A prescription by way of que estate in the lessee for years of the manor is ill, *Grammer* v. *Watson*, 1 Lutw. 81. And see Lex. Man. 49, 53; and the pleadings in *Grammer* & *Watson*, Ib. App. pl. 14. Prescription by customary freeholder, in a *que estate* good. *Follet* v. *Tweake*, 2 Lord Raym. 1188.

his ancestors and all those whose estate he has, have had common in such a place for him and his tenants at will, &c. but as against the lord, he must prescribe by way of usage only (173).

It would seem, however, that the tenants of a manor may prescribe generally upon usage in *non decimando* on a prohibition for staying a suit for tythes (174): but unity of possession of the manor and parsonage in a Prior, has been held not to be a discharge of tythes for the copyholders (175).

Yet it must not be supposed that *all* copyholders can prescribe against their lord. In the case of *Cage* & *Dod* (176), the court said that a

(173) *Foiston* & *Crachroode*, 4 Co. 31. b. *Pearce* v. *Bacon*, or *Barker*, Cro. Eliz. 390. Gouldsb. 133. Mo. 461. Ca. 647. *Crowther* & *Oldfield*, *ante*, n. 154. *Kenchin* & *Knight*, 1 Wils. 253-4. S. C. *Gateward's* case 6 Co. 60. And see 2 Sir W. Bl. 927-8.

It sometimes happens, that copyholders have a right of common in wastes out of the manor, and when that is the case, they must prescribe by way of *que estate* in the lord, and not by way of custom. *Vide Sharp* v. *Lowther*, ubi sup. *Barwick* v. *Matthews*, 5 Taunt. 365. S. C. 1 Marsh. 50. 7 East, 485. *Roberts* v. *Young*, Hob. 286. *Foiston* & *Crachroode*, *sup.* Dy. 363. pl. 27. *Trigge* v. *Turner*, 3 Lev. 98. Chitty's Pleading, 2 Vol. 592. *Ante*, p. 580.

If the party prescribe absolutely, and the evidence is of a prescription under a condition, it is a variance, *secus* if the condition is not annexed to the prescription, *Gray's* case, 5 Co. 78. b.

(174) *Crouch* v. *Fryer*, Cro. Eliz. 704, 784. S. C. Mo. 618. S. C. Yelv. 2. and see *Stephenson* v. *Hill*, 3 Burr. 1273.

(175) *Branche's* case, Mo. 219. 1 Gwillim, 156. See also *Stephenson* v. *Hill*, *sup.*

(176) Sty. 233. *Tropnell* v. *Kyllyk*, Keilw. 77.

copyholder for life could not prescribe against his lord, but that a copyholder in fee might.

This distinction is sanctioned by the rule in freehold cases (177), but I would submit that by analogy to the power of committing waste on copyhold lands (178), a copyholder for life with power to renew or to nominate a successor, is on the same footing with a copyholder of inheritance, and may perscribe against his lord.

But a copyholder of inheritance, I apprehend, cannot prescribe to have common in exclusion of the lord, though a prescription for copyholders to have sole pasture has been held good (179).

It should seem that a custom for the lord to

(177) *Thompson* v. *Roberts*, Fortesc. 339. *Smith* v. *Morris*, Ib. 340. 6 Co. 60.

(178) *Ante*, p. 473-4.

(179) *Hoskins* v. *Robins*, 1 Mod. 74. S. C. 2 Saund. 324. S. C. 2 Keb. 842. S. C. 2 Lev. 2. S. C. Pollexf. 13. S. C. 1 Vent. 123, 163, and see the Pleadings in this case, Lex. Man. App. pl. 13. Vide also *Potter* & *North*, 1 Vent. 383. S. C. 1 Saund. 347. S. C. 2 Keb. 513-17. S. C. 1 Lev. 268: It was held in this case, that prescription by freeholders and custom by copyholders, may be joined in one plea. See the pleadings in this case Lex. Man. App. pl. 12. *Vide* also *North* v. *Coe*, Vaug. 251. 1 Lev. 253. 2 Bulst. 87. N. (6) Co. Litt. 122. a. *Kentick* v. *Pargiter*, Cro. Jac. 208. S. C. Yelv. 129. *Dowglass* v. *Kendal*, *ib.* 256. *Pitt* v. *Chick*, Hut. 45.

The want of averment of levancy and couchancy, when such is the prescription, will be aided by verdict, see 1 Vent. 165, in *Hoskins* & *Robins*. So also the insufficiency of pleading a license for a stranger to put in his cattle, which license must be by deed. *Hoskins* & *Robins*, sup. And see Cro. Jac. 575 in *Monk* v. *Butler*.

make grants of the waste *with the consent of the homage*, to the prejudice of a right of common in the tenants of the manor, is good, the practice being evidence of a reservation of the right, upon the original grant by the lord, of the privilege of common over the waste, rendering therefore the right of the tenant subservient to that of the lord (180).

And by the same rule, the lord may by immemorial usage, have the right to dig pits, or to em-

(180) *Folkard* v. *Hemmett and others*, 5 T.R. 417. (n. a). And see *Wentworth* v. *Clay*, Fin. Rep. 263-4. *Boulcott* v. *Winmill*, 2 Campb. 261. *Lord Northwick* v. *Stanway*, 3 Bos. & Pul. 346.

The grant in the above case of *Folkard* & *Hemmett* was made for the purpose of building houses on the ground. De Grey, C. J. said, "The plaintiff must prove "himself to be in possession of "a right of common, and that "this right has been preju- "diced; any prejudice in the "minutest degree is sufficient. "The defendants justify under "the usage. I will not call it "a custom, because I look on "it as a reserved right of the "lord. There are two consi- "derations; 1st, If this usage "be true? 2dly, If true, Whe- "ther legal? As to the first, "the defendants have proved "by the Court Rolls, that it "has been the usage ever since "1599. As to the 2d, It is "a matter of law; a question "of novelty and importance. "The reason of such a reser- "vation by the lord, might be "its vicinity to London." The jury thought the land was of no value, and consequently that the plaintiff was not damaged, and they found a verdict for the defendants.

If a building be erected on the waste, under a grant made by the lord, even without the assent of the homage, and the tenants, having rights of common, stand by and make no objection on laying the foundation of it; Qu. If equity would not interpose to prevent the building being pulled down. 6 Vin. Cop. (W. d.) pl. 3.

power others to do so, although there be not sufficient herbage left for the commoners (181); but rights of this nature are perfectly distinct from the privilege which every lord of a manor possesses under the statute of Merton (182), of inclosing and approving any part of the wastes, provided he leave sufficient common of pasture for the tenants (183).

And in a recent case (184), where the lord of the manor had been in the habit of granting leases of parcels of the waste for upwards of 150 years, under which the whole of a common had been inclosed, Abbot C. J. thought it was too much to presume a reservation of a power by the lord at the time of the original grant, the effect of which would be to enable him to annihilate the right of common altogether (185).

(181) *Bateson* v. *Green and another*, 5 T. R. 411.

(182) 20 H. 3. c. 4. In the construction of this statute any person seised in fee of part of the waste may approve, though not lord of the manor. *Glover* v. *Lorne*, 3 T. R. 445.

(183) It has been doubted whether equity has any jurisdiction on this subject, see *How* v. *Bromsgrove*, 1 Vern. 22. ——— v. *Palmer*, 5 Vin. 8. pl. 33; but the court has frequently directed issues to try if sufficient common were left for the tenants. *Weekes* v. *Slaie*, 2 Vern. 301. *Artlington* v. *Fawkes*, ib. 356. And see 3 P.W. 257, in *Holder* v. *Chambury*.

(184) *Badger* v. *Ford*, 3 Barnew. & Ald. 153.

(185) In the case of *Drury* v. *Moore*, 1 Stark. 102, it was held, that evidence of encroachments by the lord on the rights of commoners, could have no weight against evidence of long enjoyment, and of grants by the lord, subject to the confirmation of the commoners.

It may not be improper to notice here, that in the case of *Fawcet* v. *Strickland et al.* (186), it was ruled by the court of Common Pleas, that although the statute of Merton speaks only of common of pasture, so that the lord cannot approve against common of turbary, yet where there is common of pasture and common of turbary on the same waste, he may inclose against the common of pasture; therefore in an action against the lord complaining of such inclosure (187), the tenant must shew, not only that there is an insufficiency of pasture left, but also an interruption in the enjoyment of the common of turbary.

(186) 2 Comy. 578. S. C. Willes 57. And see a similar determination in *Shakespear* v. *Peppin*, 6 T. R. 741. *Vide* also *Duberley* v. *Page and another*, 2 T. R. 391. *Smith* v. *Fetherwell*, 1 Freem. 190. 2 Mod. 6. *Leech* v. *Widsley* or *Medgley*, 1 Vent. 54. 1 Lev. 283. 2 Keb. 590, 601. 1 T. Raym. 185. *Clarkson* v. *Woodhouse*, 5 T. R. 412, n. a. And as to extinguishment of common, see *Bacon* & *Palmer*, 1 Brownl. 174. *Post.* tit. 'Enfranchisement.'

(187) The remedy against the lord, when there is not sufficiency of common left, is action on the case or assize. *Sadgrove* v. *Kirby*, 6 T. R. 485-6. S. P. *Cooper* v. *Marshal*, 1 Burr. 259. *Clayton* v. *Horsey*, 1 Roll. Abr. 106. (M.) pl. 19. And the particular surcharge by a lord must be shewn. 2 Mod. 6. 1 Lutw. 102. 3 Wils. 281, 290. But a commoner may enter forcibly, if the lord by any act wholly excludes him from an exercise of his right. *Sadgrove* & *Kirby*, *Cooper* & *Marshal*, sup. And see *Mason* v. *Cæsar*, 2 Mod. 65.

It has, however, been said, that a copyholder can have no assize of common against his lord, but is to be relieved in equity. Toth. 108, cites *Tenants of Petworth* v. *Earl of Northumberland*, 38 and 39 Eliz. and *Colcot* v. *Lea*, same year, and 43 Eliz.

A copyholder, in case of intrusion on his commonable rights by a stranger, may distrain the cattle damage feasant, or bring his action on the case (188): but one commoner cannot distrain the cattle of another for damage feasant, though an action will lie for surcharging the common, however trifling the injury (189), and although the plaintiff has himself overstocked (190).

Nor can the lord distrain for surcharge of common, where there is a colour of right (191).

(188) *Robert Marys's* case, 9 Co. 111. *Dixon* v. *James*, Lutw. 1238.

(189) *Hall* v. *Harding*, 4 Burr. 2427. S. C. 1 Sir W. Bl. 673. *Wells* v. *Watling*, 2 Sir W. Bl. 1233. And see Supp. Vin. Abr. tit. 'Commoner,' (B) pl. 2, 5.

(190) *Hobson* v. *Todd*, 4 T. R. 71.

(191) 3 Wils. 126. For more of Common in general, see Vin. Abr. and Supp. under tit. 'Common,' and 'Commoner.' Vide also Bacon's Abr. and Com. Dig. tit. 'Common.'

As to the mode of pleading in respect of Commons, after severance of the waste, see Co. Cop. s. 42. Tr. 98.

And the reader is referred for further information on the subject of prescription by copyholders, and for some interesting remarks on the legality of a prescription by the lord, for fines on marriage of copyhold tenants and for special courts &c., to Calth. Read. p. 29 to 36, and 6 Vin. tit. 'Copyhold,' (P. e).

CHAP. XIII.

Of the Prerogative Writ of Mandamus, and the Aid of Courts of Equity. And first,

OF THE WRIT OF MANDAMUS.

WHERE a person can shew a colourable title to a copyhold estate, the Court of King's Bench will grant a mandamus to compel the lord to admit him: and the lord is also compellable by this writ to accept a surrender from a copyholder (1).

This power has certainly been questioned, but any doubts formerly entertained on the subject, are completely removed by the several decisions I am about to refer to.

It is true, that when a party has a specific *legal* remedy (2), the Court of King's Bench has in

(1) *Freeman* v. *Phillips*, 4 Mau. & Sel. 486. And either of the whole, or a portion of his copyhold lands, see *Snag* v. *Fox*, Palm. 342; and of the whole, or a portion of his interest, see *Fitch* v. *Hockley*, Cro. Eliz. 441-2.

(2) But having a remedy in equity is no answer to an application for a mandamus. 3 T. R. 652.

A court of equity has no jurisdiction to grant an injunction to stay proceedings on a mandamus. *Lord Montague* v. *Dudman*, 2 Ves. 398. *Ante*, p. 368. (n. 116). But it will stay proceedings either by action or indictment, where the question of right is depending in that court. *The Mayor of York* v. *Pilkington*, 2 Atk. 302. 2 Ves. 398.

several instances refused to grant a *mandamus*; but as both the surrenderor and surrenderee are, I conceive, without remedy at law against the

(3) Vide *The King* v. *The Marquis of Stafford and another*, 3 T. R. 646, in which the court of B. R. had granted a rule to shew cause why a mandamus should not issue, commanding the defendants, as lords of the manor of Stowe Heath in Staffordshire, to allow and present to the ordinary of the peculiar jurisdiction of the royal free chapel and parish of Wolverhampton, the nomination of W. M. clerk, to be stipendiary priest or curate of the chapel of Willenhall, in the said manor, in order that he might obtain a license from the ordinary. The application in this case was made in consequence of the refusal of the defendants, as lords of the manor, to allow and present to the ordinary, the nominee of the majority of the inhabitants; and was founded on affidavits, stating, that on a commission of charitable uses, it was agreed between the then lord of the manor of Stowe Heath and the freeholders, being inhabitants of Willenhall, within the said manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the said chapel of Willenhall, to be nominated by a majority of the said inhabitants, and to be allowed by the lord, by whom the curate was to be presented to the lord for a license to preach, and that the usage of nomination, &c. had ever been pursuant to the said agreement. The court observed, that it seemed as if the inhabitants had only an *equitable right*, and that if they had a *legal* right, it might be asserted in a *quare impedit* [Rast. 506 b.], and that perhaps the better remedy would have been an information in chancery, in the name of the attorney general. See also *The King* v. *The Bishop of Chester*, 1 T. R. 396, in which a *mandamus* to the bishop to license a curate of an augmented curacy, where there was a cross nomination, was refused, the party having a specific legal remedy by *quare impedit*. Vide also *The King* v. *Bristow*, 6 T. R. 168, where the court refused to grant a mandamus to the treasurer of a county, to obey an

lord of the manor for refusing admittance (4), it appears to me somewhat singular, that any question should have arisen on this point of jurisdiction.

So long back as the case of *The King* v. *The Borough of Midhurst* (5), we find the court exercising this power to compel the lord of the manor to hold a court, and the homage to present certain conveyances to purchasers of burgage tenements, intitling them to be sworn in burgesses of the corporation, and to vote for members of parliament; and there the court observed, that to deny the writ would be to say, there was a right without a remedy.

In *Roe* d. *Noden* v. *Griffits and others* (6), Lord Mansfield said, that the act of admittance to a copyhold was mere form, and that the lord was an instrument only, and compellable to admit according to the surrender, and that a *mandamus*, or a decree in chancery, would compel him.

order of the court of quarter sessions, the proper remedy being by indictment: and *The King* v. *The Mayor of Colchester*, 2 T. R. 259, where the court refused a *mandamus* to admit a recorder of the borough, because there was a recorder *de facto*, and the parties had another remedy by *quo warranto*. *Vide* also *Rex* v. *The Marquis of Stafford and another*, 3 T. R. 646. *Rex* v. *The Churchwardens of St. Peters, Thetford*, 5 T. R. 364. *Rex* v. *The Chancellor of the University of Cambridge* (*Frend*'s case), 6 T. R. 110.

(4) *Ante*, p. 368-9. *Towel* v. *Cornish*, 2 Keb. 357; but see *Galloway*'s case, cited 3 Bulst. 217. Lex Cust. 158, and 5 Burr. 2769.

(5) 1 Wils. 283.

(6) 4 Burr. 1961; see also *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2787. Lofft, 390. 2 Bl. Com. 368. 3 *ib.* 110.

And in *The King* v. *Rennett* (7), the Court of King's Bench expressed their decided opinion, that a *mandamus* ought to be granted to compel a lord to admit a copyholder, on a proper case being laid before them, although they refused to interfere in this instance, as the party claimed by descent, and had therefore a complete title without admittance, against all the world except the lord.

In *The King* v. *The Lord of the Manor of Hendon and his Steward* (8), a rule for a *mandamus* to admit C. on the surrender of A., A. having previously sold and covenanted to surrender to B. who had assigned to C., was made absolute.

And again, in *The King* v. *Coggan* (9), on an application for a *mandamus* to the lord and steward of the manor of Laleham Billets, to admit W. to a copyhold tenement, to which his father was intitled as purchaser, but who died before admittance, Lord Ellenborough expressed himself aware of the doubt entertained on the other side

(7) 2 T. R. 198.

(8) *Ib.* 484. *Ante*, p. 267.

(9) 6 East, 431. S. C. 2 Smith, 417; and the court had just before granted a *mandamus* to the Duke of Leeds to admit Mr. Conolly, for the purpose of enabling him to try his title to customary tenements in the manor of Wakefield, Yorkshire, for which he afterwards brought an ejectment; see *Roe* d. *Conolly* v. *Vernon*, 5 East, 51. S. C. 1 Smith, 318. *Vide* also *The King* v. *The Marquis of Stafford and others*, 7 East, 521. S. C. 3 Smith, 459. *The King* v. *The Lord and Steward of the Manor of Water Eaton*, 2 Smith, 54. *Freeman* v. *Phillips*, 4 Mau. & Sel. 486. *Ante*, p. 572. *The King* v. *Willes*, 3 Barnew. & Ald. 510. *Ante*, p. 499.

of the hall (10), yet, the courts having for many years been in the habit of granting such writs, he could not, he said, doubt the power; and his lordship added, that he had himself, when at the bar, obtained such writs in two or three instances against the noble lord who had been named (Lord Lonsdale), to compel him to admit tenants to copyholds.

The lord and steward are also compellable by *mandamus*, to permit the court rolls to be inspected by any person claiming an interest under them: so in *The King* v. *Lucas and another* (11), the Court of King's Bench granted a *mandamus* to the lord and steward, to permit a person who had a *primâ facie* title to certain copyhold lands within the manors of Filby, in Norfolk, to inspect the court rolls, and take copies thereof: the right was objected to, as there was no cause depending that involved the title; but Lord Ellenborough observed, that he did not know why there should be a cause depending, to found an application of that sort (12), where the person

(10) *Vide Williams* v. *Lord Lonsdale*, 3 Ves. 752-4.

(11) 10 East, 235; and see *Folkard* v. *Hemet and another*, 2 Sir W. Bl. 1061. *Addington* v. *Clode*, *ib.* 1030. *Rex* v. *Shelley*, 3 T. R. 141. *Talbot* v. *Villeboys*, cited *ib.* by Mr. J. Buller. *Vide* also *Roe* v. *Aylmer*, *Hobson* v. *Parker*, and *Baldwin* v. *Tudge*, in Barnes, cited *ib.* 142. n. a. *Gregory* & *Cosens*, Bendl, 197. Anon. 11 Mod. 111. *Love* v. *Bentley*, Ib. 134. *Sed vid.* Sty. 128; and *The King* v. *Allgood*, 7 T. R. 746; where the court held, that a freehold tenant had no right to inspect the court rolls, unless there were some cause depending. Tidd's Pract. 597.

(12) This doctrine was dis-

making it was intitled to the copyhold, unless some conveyance had been made by those under whom he claimed.

And in *Bateman and others* v. *Phillips* (13), Heath, J. said, that in the case of a copyholder, it is sufficient to enable him to obtain an inspection of the court rolls, that he claims an interest under them (14), and that it is not necessary to shew by affidavit that he has an interest.

But the lord is not compellable by *mandamus* to shew the Court Rolls where his own title is concerned. So where the lord brought an ejectment for lands, claiming them as copyhold; and t

inctly recognised by his lordship and Mr. J. Bayley, in the case of *Rex* v. *Tower*, 4 Mau. & Selw. 162.

It is only when no action is depending that the motion is for a mandamus. See Nolan's Ed. of Strange, 1223 in notis, Tidd's Pract. 598 (n. f). Post. (n. 14).

(13) 4 Taunt. 162. But see Tidd's Pract. 598.

(14) The privilege of inspecting court rolls is confined to persons having an interest in them, *Crew, qui tam* v. *Saunders*, 2 Stra. 1005.

In an action on the case by one copyholder against another for an encroachment on the common, a rule was obtained on the steward to permit the plaintiff to inspect and take copies of original minutes of two manor courts, and to produce the court rolls at the trial, which rule was made absolute *for inspecting all books and rolls relating to the defendant's title, and producing them at the trial. Folkard* v. *Hemmet*, C. B. 16 Geo. 3. 2 Sir W. Bl. 1061. And see 5 Mod. 396 in *Cox* v. *Copping*, 2 Ves. 621.

"If the rule be moved for on behalf of a *copyhold* tenant of the manor, it is absolute in the first instance, on the signature of counsel, in the King's Bench; 3 T. R. 141. otherwise it is a rule to shew cause. See 7 T. R 746." Tidd's Pract. 486. n. a.

the defendant claimed them *as his freehold*, and moved for a rule to inspect the Court Rolls, the Court of B. R. refused the application, observing, that such a rule was never heard of, the plaintiff not being obliged to assist the defendant to make out his title (15).

Should the lord or his steward refuse to receive and inrol a surrender, it may be enforced by a mandamus: But in a recent case the writ was refused, the objection being that the surrender had not been prepared by the steward, or his deputy, under a usage of that nature, and which was held to be a good custom (16).

Secondly, of the Aid of Courts of Equity.

The acceptance of a surrender of, and an admittance to, copyholds may also be compelled by a decree in equity (17); and it would seem that

(15) *Smith* v. *Davies*, 1 Wils. 104. And see 2 Ves. 621.

(16) *Rex* v. *Rigge*, 2 Barnew. & Ald. 550. *Ante*, p. 31.

It would seem that a mandamus will lie to be restored to the stewardship of a customary court, *Ile's* case, 1 Vent. 153.

A court of law will exercise a summary jurisdiction against a steward who is an attorney of the court, *ante*, p. 135 (n. 109).

(17) *Roe* d. *Noden* v. *Griffits and others*, 4 Burr. 1961. *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr. 2787. *Tobell* v. *Cornish*, 2 Keb. 357. *Moor* v. *Huntington*, Nels. C. R. 12. *Lunsford* v. *Popham*, Toth. 64. *Newby* v. *Chamberlain*, ib. 68. *March* v. *Gage*, ib. *Earl of Derby* v. *Wainwright*, cited Hard. 169. And see *Rowell's* case, Dy. 264. pl. 38. 6 Vin. Cop. (Y. e.) Heil. 2.

this power was first assumed by the courts of equitable jurisdiction (18).

Equity will also assist an heir in discovering whether there be any copyholds unsurrendered to the uses of the will, but if the bill seeks a relief to which the plaintiff is not intitled, that circumstance will support a general demurrer (19).

And a court of equity will make an order on the lord or steward, or other person having the custody of the court rolls, to produce the same for the inspection of any one claiming an interest under them (20).

Although a court of law, in a question between the lords of different manors, will not enforce an inspection of the court rolls, yet a court of equity, it appears, will do so on a bill for a discovery (21).

It will also entertain a bill by the lord of the manor, for discovery of the boundaries and descriptions of lands; and for a commission to

(18) *Ford* v. *Hoskins*, Cro. Jac. 368. S.C. 2 Bulst. 336. S.C. 1 Roll. Rep. 195. *Westwick* v. *Wyer*, 4 Co. 28. b. 2 Bl. Com. 367. And see Fitz. N.B. 12. Cary, 3, 4. *Ante*, p. 368.

(19) *Jones* v. *Jones*, 3 Meriv. 170, 174-5.

(20) *Anon.* 2 Ves. 578. *Draper* v. *Zouch*, Finch 249. *Corbett* v. *Peshall*, Toth. 109. *Stacy's* case, Lat. 182. Dy. 264. pl. 38. Marg. *Langham* v. *Lawrence*, Hard. 180. 6 Vin. Cop. (Y. d). *Ante*, n. 14.

In *Mott* v. *Buxton*, 7 Ves. 201, the court refused its aid to a testamentary guardian, to compel a steward appointed by trustees, to deliver up Court Rolls.

(21) *Anon.* 2 Ves. 621.

issue, if necessary, to distinguish freeholds from copyholds where they are intermixed (22); but this is only under special circumstances, and when some equity is superinduced by the act of the parties, a confusion of lands not being, *per se*, a ground for the interposition of the court (23). And it is indispensably necessary that the interests of all the parties who may be concerned, should be before the court (24). Neither will equity interfere in a disputed right, until the right has been tried at law, except where the justice of the case requires some discovery of facts (25).

(22) *The Duke of Leeds* v. *the Earl of Strafford*, 4 Ves. 180. *Clayton* v. *Cookes*, 2 Atk. 450. *Lord Abergavenny* v. *Thomas*, 3 Anst. 668. n. a. *Lethulier* v. *Castlemain*, Sel. Ca. Temp. King. 60. *Wintle and others* v. *Carpenter and Pisburgh*, Fin. R. 462. *Ante*, p. 492. n. 2. 3 P. W. 149, in *North* v. *Earl and Countess of Strafford*. See also *Willis* v. *Parkinson*, 2 Meriv. 507. 1 Swanst. 9. And Equity will entertain a bill by the lord of a manor to establish a right to tolls, but where it did not appear that the toll bars *stood* within the manor, the bill was dismissed. *Attorney General* v. *Ayre*, Bunb. 68.

(23) *Bouverie* v. *Prentice*, 1 Bro. Ch. R. 201. *Duke of Leeds* v. *Powell*, 1 Ves. 172. *Speer* v. *Crawter*, 2 Meriv. 418. And see *Webb* v. *Conyers*, cited 1 Bro. Ch. Rep. 41, 2 Anst. 391. *Winterton* v. *Lord Egremont*, cited 2 Anst. 392. *Rouse* & *Barker*, 4 Bro. P. C. 660.

(24) *Atkins* v. *Hatton*, 2 Anst. 386. And see *Webb* v. *Banks*, 2 Eq. Ca. Abr. 164. In *Norris* v. *Le Neve*, 3 Atk. 82, Lord Hardwicke decided that the parties should bear the expense of the commission equally, though their interests were unequal, but the value of the estate belonging to both was considerable, and there appeared to be no fault in either party.

(25) *Lord Tenham* v. *Her-*

Although no common law process can issue to levy a debt upon copyholds, yet they are subject to sequestration on a decree in equity (26); and where a commission was issued to sequester the personal estate of A, and the rents and profits of his real estate; upon a motion that the commissioners should be at liberty to *let* an uninhabited copyhold house and land, and to pay the rents into the bank, to be laid out together with the dividends thereof, in trust in the particular cause, the late Vice Chancellor made the order as prayed (27).

Equity will, under particular circumstances, grant an injunction even against an act that is a forfeiture (28), though it was formerly supposed

bert, 2 Atk. 484. *Whitchurch* v. *Hide,* 2 Atk. 391. *Northleigh* v. *Luscombe,* Amb. 613. *Waring* v. *Hotham,* 1 Bro. Ch. Rep. by Belt, 40. S.C. 2 Dick. 550. 2 Anst. 395. *Wake* v. *Conyers,* 2 Cox 360. 1 Eden 331. *Weller* v. *Smeaton,* 1 Bro. Ch. Rep. by Belt. 573. *Welby* v. *Duke of Rutland,* 2 Bro. P.C. 39. 2 Ves. 621. Anon. And after several trials at law, equity has refused to direct an issue on the same question. *Smith* v. *Sallett,* 2 Ch. R. 76.

Although the existence of a custom is to be tried by a jury, *ante,* p. 33; yet by consent of parties, a court of equity will refer it to be ascertained by the Master, *Edwards* v. *Fidel,* 3 Madd. 239.

(26) See *Whitehead* v. *Harrison,* 2 Eq. Ca. Abr. 713. 1 Barnard, B.R. 431. *Ante,* p. 61. n. 29.

(27) *Dunkley* v. *Scribnor,* 2 Madd. 443. For the nature and operation of a sequestration, vide 1 P.W. 307-8. 2 P.W. 621-2. 1 Ves. 182-3. Ca. Temp. Talb. 222. Bunb. 272. 3 Bl. Com. 444.

(28) See *Richards* v. *Noble,* 3 Meriv. 673, which was a bill by the lord against copyholders,

that the lord was left to his legal remedy in all cases, and that an injunction would be granted, only where an action of waste would lie (29).

A copyhold tenant can have no relief in equity against a forfeiture by leasing without license, or for wilful waste (30), but a court of equity has relieved against a forfeiture by cutting down timber on one copyhold, which was employed for repairs on another (31): And in the case of wilful waste by cutting timber, it has directed an issue to try *quo animo* it was cut (32); and would probably relieve against a forfeiture, where the act was done under a colour of right (33).

for an account of turves cut and taken, and for an injunction, not waiving the forfeiture, *ante*, p. 484. But a bill for discovery of waste is demurrable to. See *Att. Gen.* v. *Vincent*, Bunb. 192. *Lord Uxbridge* v. *Staveland*, 1 Ves. 56.

(29) *Dench* v. *Bampton*, 4 Ves. 700. It was long since held that lessees of copyholders ought to be restrained in equity from committing waste, such lessees being punishable in waste. *Dalton* v. *Gill* & *Pindor*, 19 Eliz. cited Cary 89, 90.

(30) *Sir H. Peachy* v. *Duke of Somerset*, 1 Stra. 447. S. C. Pre. Ch. 568. 2 P. W. 147. But see *ante*, p. 528-9. (n. 131, 134). In cases of permissive waste equity will sometimes relieve. See *Cox* v. *Higford*, 2 Vern. 664. *Ante*, p. 529.

Relief will also in some cases be granted in equity, against an ill presentment, or the want of a timely presentment of a surrender, *ante*, p. 300. But under some circumstances it will be refused, Anon. Skin. 142.

(31) *Nash* v. *Earl of Derby*, 2 Vern. 537, &c. *Ante*, p. 530.

(32) *Thomas* v. *Porter*, 1 Ch. Ca. 95. 2 Freem. 137, *Ante*, p. 529.

(33) "*Gravener* cont' *Rake*, "the court compels the lord to "admit a tenant copyholder to "sue at law, without any for- "feiture of his copyhold, in "Mich. 31 & 32 Eliz. fo. 21." Toth. 65.

Where there is a doubtful right between the lord and tenant, a court of equity will restrain the assertion of it, until the right is tried at law. This latter interposition of the courts of equity has already been the subject of discussion, in our consideration of the relative rights of property in trees and mines, and is fully established by the case of *Grey* v. *the Duke of Northumberland* (34).

We have also seen that, when the copyhold tenants are dispunishable of waste by the custom of the manor, an heir taking by way of resulting trust until the happening of a contingency, will be restrained from committing waste by the injunction of a court of equity, and that the Court will interpose generally between parties, as in freehold cases (35).

And that should there be an error in any adversary proceedings in the customary court, equity will compel the lord to do justice, and will correct the proceedings if any thing be done therein against conscience (36).

I have also shewn, that although a court of equity will not interfere between lord and tenant where there is a legal remedy, except in the case

(34) 13 Ves. 236. 17 *Ib.* 281. And see *ante*, p. 601.

(35) *Ante*, p. 482, and see 3 Atk. 211. *Bamborow* v. *Alexander*, Cary, 105. *Litton* v. *Cooper*. *Ib.* 73. *Marston* v. *Marston*, Nels. R. 24.

(36) *Ante*, pp. 78, 562-3. But a court of equity will not entertain a bill to rectify an error in a recovery, after a great length of time, and against a purchaser. *Bell* v. *Cundell*, Amb. 101.

of wilful waste, (and then only under particular circumstances,) yet that it will relieve in all cases where the party cannot have redress at law (37): and although one tenant alone cannot institute a suit on a general right, yet equity will entertain a bill which is calculated to avoid a multiplicity of suits (38); and on this ground the court will sustain a bill by the tenants of a manor, to establish their right to the profits of a fair (39).

And a bill of peace may be brought either by the lord against the tenants, or by the tenants against the lord (40).

A court of equity will also interpose its influence under all circumstances of fraud: So where a purchase was made of a copyhold estate from a father, tenant for life, and his son te-

(37) Cary 3, 4. *Ante*, p. 421-2. 509, 529, 603. An heriot on alienation is not favoured in equity, *ante*, p. 436, n. 111.

(38) *Cowper* v. *Clerk*, 3 P.W. 155. 2 Anst. 390. in *Atkins* v. *Hatton*. *Dyer* v. *Dyer*, 44 Eliz. Lex Cust, 323. Cary, 29, 30. *Musgrave's* case, *Ib.* 38. *How* v. *Bromsgrove Tenants*, 1 Vern. 22, *ante*, p. 408. And see Toth. 111, cites *Sterling* v. *Tenants of Burton*, that a composition formerly made between lords and tenants, ought to bind a purchaser or an heir, and so decreed 40 Eliz. lib. A. fo. 434. But a decree against the lord of a manor will not bind copyholders who are no parties to the suit. See *Poore* v. *Clerk*, 2 Atk. 516.

(39) *New Elme Hospital* v. *Andover*, 1 Vern. 266.

(40) *Conyers* v. *Lord Abergavenny*, 1 Atk. 285. And see *Lord Tenham* v. *Herbert*, 2 Atk. 484. And it would seem to have been held, that in a bill of this nature, though neither the lord or tenants should have a greater estate than for life, the decree is equally binding. Cary, 29, 30. And see *Dunn* v. *Allen*, 1 Vern. 427. *Meadows* v. *Patherick*, Fin. R. 154.

nant in tail in remainder, and it appeared that the parties did not meet on equal terms, the vendors, who were in great distress, not having had the benefit of any professional advice, and that the price given was very inadequate, the Vice Chancellor ordered the conveyance to be set aside upon the plaintiff's repaying the amount of the purchase money, and the expences of the recovery, with interest at 5 per cent, observing as to the costs, that although he could not, after the cases which had been decided, make the defendant pay costs, yet he could not bring his mind to give to a defendant the costs of a suit, made necessary by his unfair dealing (41).

(41) *Wood* v. *Abrey*, 3 Madd. Rep. 424. And see *Mildmay* v. *Hungerford*, 2 Vern. 243, where a copyhold at Newington was devised to the plaintiff for life, remainder to his first and other sons in tail, remainder to the defendant in fee; and the plaintiff being minded to make himself absolute owner of the estate, his wife being then ensient, was advised that if he bought in the reversion in fee, and took a surrender thereof to his own use, *that* would merge his estate for life, and by consequence destroy the contingent remainder to his son, there being then no issue born. The plaintiff accordingly agreed to give the defendant £550 for the reversion; and now brought his bill to be relieved against the security given to the defendant, for that he was deceived therein, in regard he now understood such surrender of the reversion would not bar the son, *since born*, the freehold and inheritance being in the lord, "so not the like in-"convenience as of freehold "estates at common law, in "respect of contingent re-"mainders, where there is none "against whom to bring the "præcipe." Per Cur. Pay Prin-"cipal, Interest, and Costs, or "be dismissed with costs." "*Ante*, p. 454-5, 458.

In another case (42), a copyhold estate of the yearly value of £16 (on which was timber of the value of £150), was sold by A. to B. for £630. A. covenanted to surrender on or before Michaelmas then next. B. paid 10*s.* in part of the purchase, entered on the premises, cut down timber, stocked the land, and did every thing as owner. A. brought his bill in Chancery for a specific performance of covenants, and proved he had given notice in writing that he would surrender the next court day, and attended accordingly. On the defendant's part it was proved that he was disordered in his senses, and urged that as no custom was alleged of the tenant's having power to cut down the timber, there was a plain imposition. The Chancellor was of opinion it was a great over-value, and that the defendant's cutting down timber was a convincing proof of his folly, because a direct forfeiture, and dismissed the bill; further observing, "but as it "is, it is a matter merely at law; the covenant is "to surrender at or before Michaelmas; you say "you were ready at the next court, which does "not appear to have been before Michaelmas; "if surrender had been, action would have lain "at law."

In discussing the aid afforded in copyhold cases by the Courts of Equity, it may be proper to no-

(42) *Edwards* v. *Heather*, Sel. Ca. Ch. Temp. King. 3. Vide also *Hammond* v. *Ainge*, a case of relief on an admission of a freeholder by the fraud of the lord and steward, cited 6 Vin. Abr. 115.

tice that a mortgagee of copyholds who is not in possession, may bring his bill against a mortgagor before admittance for a decree of foreclosure, and after he has obtained such a decree, may bring his ejectment for the possession of the mortgaged tenements (43).

And I think it right, in conclusion of the present chapter, to observe, that the jurisdiction of the courts of equity would seem to extend to a claim of freebench, where the widow of a copyholder might prefer that mode of enforcing her right, to a plaint in the lord's court in the nature of a real action: This inference appears to me to be justified by the principle of the analogous interposition of equity, in a claim to dower at common law, namely, that the parties have such an intermixture of right, that it is best for them to have relief in equity, where the title to dower is admitted, and nothing remains to be done but to assign it (44).

(43) *Sutton* v. *Stone and others*, 2 Atk. 101. And in this case it was held that, although the plaintiff had not replied to the answer of the lord of the manor, yet desiring an act to be done by him, viz. the admitting him to the copyhold estate, he must pay the lord his costs, to be taxed by the master. And see *Sayle* v. *Reeves* cited Gilb. Eq. Rep. 189. See further as to the aid of equity, *ante*, p. 260 to 266. and tit. 'Surrender to Will.'

(44) See *Mundy* v. *Mundy*, 4 Bro. Ch. Rep. by Belt. 296. n. 3. Co. Litt. 169. a. n. 2. If the right is controverted, it must go to law. *Mundy* v. *Mundy*, sup.

In *Oliver* v. *Richardson*, 9 Ves. 222, the Master of the Rolls decreed an account of arrears from the death of the husband,

But I have not been able to find any case, where equity has entertained a suit for a partition of copyholds, between coparceners, joint-tenants, or tenants in common; and as the jurisdiction it has assumed on this subject in freehold cases (45), originated altogether in the expediency of affording its aid to a principle of common law (46), and to the provisions of the several statutes of partition, of which some notice has already been taken (47), the decision that copyholds are not within those statutes, induces me to conceive, that a court of equity has no authority to compel a partition between copyholders.

though 12 years had elapsed before the filing of the bill. And see *Dormer* v. *Fortescue*, 3 Atk. 130-1.

(45) Com. Dig. Chanc. (3 V. 6.), (4 E). Mitf. 109.

(46) But this is only with reference to coparceners, as joint tenants, and tenants in common could not compel partition at common law.

(47) *Ante*, p. 104. Whether the lord's license is necessary in a partition between copyholders, see ib. n. 154.

CHAP. XIV.

Of Extinguishment and Enfranchisement.

FIRST, OF EXTINGUISHMENT.

THIS term, as contradistinguished from enfranchisement, is more immediately applicable to a transfer of the copyhold interest from the tenant to the lord.

When a copyholder conveys his interest to the lord, whether by surrender or release, or bargain and sale, or does any other act indicatory of an intention to relinquish his tenancy (1), the copyhold interest is for ever extinguished.

And the extinguishment will be for the benefit of a mortgagee or devisee, under any previous mortgage or devise of the manor (2).

If the lord have a limited estate only in the manor, even if he be a purchaser of the copyhold interest, such interest will merge for the benefit of the remainder-men (3), unless the lord make a re-grant of the property, to hold by copy (4).

(1) *Blemmerhasset* v. *Humberstone,* Hut. 65. S.C. Sir W. Jones, 41. S.C. *(Hasset & Hanson)* Win. 66. *Scroggs* 192. 1 Vol. Ca. & Opin. 166. *Ante, p.* 137. A copyholder accepting his land to hold of the lord *by bill* under his hand, and not by copy, determines the copyhold interest, *Colman* v. *Bedil,* 1 And. 199. S.C. (called *Collman* v. *Portman,*) 1 Leo. 191.

(2) *Roe* d. *Hale* v. *Wegg,* 6 T.R. 708. *Bunter* v. *Coke,* 1 Salk. 238. *Doe* d. *Gibbons* v. *Potts,* Dougl. 710. *Ante,* p. 42-3.

(3) See the cases *ante* n. 1.

(4) *St. Paul* v. *Viscount Dudley and Ward,* 15 Ves. 167. *Ante,* p. 43-4.

But it has been said, that a conveyance to a disseisor of the manor, would not be an extinguishment (5): this distinction, however, appears to be very questionable (6).

It has been decided that a release of copyholds to the grantee of the freehold, operates as an extinguishment of the copyholder's interest equally with a conveyance to the lord, when there has been no severance (7).

And if lands escheat, or are forfeited to the lord, it is an extinguishment of the copyhold interest (8); and consequently of all customs and privileges annexed to it (9).

But the copyhold interest may only be suspended by a union with the freehold, as if a copyholder marry a feme seignioress, the copyhold

(5) *Pit* v. *Moore*, 2 Show. 153. S. C. 2 Mod. 287. S. C. Sir T. Jones, 153. S. C. 1 Vent. 359. S. C., Skin. 28. S. C., 1 Freem. 245. *Ante* p. 114, 115.

(6) 1 Freem. 245. 1 Vol. Watk. on Cop. 75-6.

(7) *Wakeford's* case, 1 Leo. 102. Cro. Eliz. 21. Godb. 101. ca. 117. As the act of the lord cannot prejudice the copyholder's interest, such severance will not in itself operate as an extinguishment, *Murrel & Smith*, 4 Co. 24. b. S. C. Cro. Eliz. 252. *Melwich & Luter*, 4 Co. 26. a. S. C. Cro. Eliz. 102. *Bell* or *Beale & Langley's* case, 2 Leo. 208, 4 *Ib.* 230. *Ante*, p. 13 *et seq.*

(8) *Ante*, p. 10, 11, 19 (n. 45), 109 &c.

(9) 2 Sid. 19. All customs, as freebench, curtesy &c., must of course cease with the extinguishment of the copyhold tenure, whether by escheat, forfeiture, or by any union of the freehold and copyhold interests. *Dugworth* v. *Radford*, W. Jones, 462. *Lashmer* v. *Avery*, Cro. Jac. 126.

interest will be suspended during the coverture only (10).

So if a copyholder in his own right, become seized of the manor, or of the freehold interest in his copyhold tenement, in right only of another, or *vice versa*, the copyhold interest will be suspended during the period of such union of interests (11).

And it must be recollected, that so long as the demiseable quality of the estate subsists, it may be re-granted again by the lord, to hold by copy of court roll (12).

A copyhold interest may also be extinguished by the annexation of the freehold to the copyhold, as if a copyholder accept a lease for years from the lord, of his copyhold tenement, or accept a conveyance, or even a lease for years of the *manor*, or if the manor descend to him, in either case the copyhold interest would be extinguished (13). In the former instance, however,

(10) Co. Cop. s. 62. Tr. 142. *Anon.* Cro. Eliz. 7. Lex. Cust. 231.

(11) *Anon.* Cro. Eliz. 7. pl. 5. 1 Watk. on Cop. 358. See as to the suspension of seigniory, rent, &c. *Ascough's* case, 9 Co. 134. Kitch. 160, cites 6 H. 4. 2.

(12) *Ante*, pp. 17, 109, 118. 1 Vol. Ca. & Opin. 166. This applies also to the case of an escheat, and to any commonable rights annexed to the copyhold interest, *Worledg* v *Kingswel*, Cro. Eliz. 794. S. C. 2 And. 168. *Badger* v. *Ford*, 3 Barnew. & Ald. 153.

The *demiseable* quality is destroyed by the creation of a common law interest, but the extinguishment was before complete. 1 Watk. on Cop. 360-1.

(13) *Hide & Newport*, 17 Eliz. Mo. 185, 4 Co. 31. b, *Lane's* case, 2 Co. 16. b. S. C. (*Smith* v. *Lane*,) 1 Leo. 170, 1 And. 191. Gouldsb. 34. pl. 9. *French's* case,

that is by the acceptance of a lease of the particular tenement, the copyhold interest would be absolutely extinguished, but in the latter instance, it would remain demiseable, and might be re-granted again, to hold by copy (14).

But there is this essential difference between a conveyance of a *portion* of the copyhold interest from the tenant to the lord, and a conveyance of a *portion* of the freehold interest from the lord to the tenant; namely, that in the former instance, the portion only of the copyhold interest so conveyed to the lord will be extinguished, but the latter will operate as an extinguishment of the whole copyhold interest for ever (15).

4 Co. 31. *Gybson* v. *Searls*, Cro. Jac. 84. *Curtise* & *Cottel's* case, 2 Leo. 72. Godb. 11. pl. 16. Ib. 101. ca. 117. *Tracey* v. *Noel*, M. 2 Jac. Mo. 185, ca. 330. *Anon.* Cro. Eliz. 7. Lat. 213. 1 Brownl. 32. Kitch. 172. Co. Cop. s. 62. Tr. 141-2. 1 Watk. on Cop. 360. But see Sav. 70-1. pl. 146. Kitch. 171. Even if a copyholder take a conveyance of the manor in joint-tenancy, it should seem that the copyhold interest would be extinguished, as joint tenants are seized *per mie et per tout*, Calth. 92-7. 1 Watk. on Cop. 357. And by Calth. p. 97, if a manor be leased for years, and a copyholder purchaseth the reversion in fee, by this the copyhold is destroyed, and the lessee of the manor may oust the copyholder and hold the land for the time. And see Lex. Cust. 226. Vide also the case of a demise of copyhold by the lord to C for life, and a subsequent conveyance of the freehold interest to B for life, reserving a rent, and then a grant to C by fine *come ceo &c.*, who accepted the rent of B; and it was questioned whether the copyhold of C were gone in conscience. 28 H. 8. *Compton* v. *Brent*, Dy. 30. b. Cary, 8.

(14) *French's* case, 4 Co. 31. b, cites *Hide* & *Newport's* case, ubi sup. *Gybson* v. *Searls*, sup.

(15) See Kitch. 171. By a release of the seigniory in part

To exemplify this, if a copyholder in fee surrender to the use of the lord for life, with remainder over to a stranger, or reserving the reversion to himself, it will only be an extinguishment of the estate so limited to the lord, and will not affect the remainder or reversion (16); but if a copyholder in fee accept a common-law lease of his copyhold tenement, either from the lord or his grantee, the whole copyhold interest will be extinguished (17), but for which circumstance, indeed, the latter might with more propriety be deemed an enfranchisement.

And when a copyhold interest is extinguished by the acceptance of a common-law lease, from a person having a limited interest only in the manor, the demiseable quality of the copyhold land will not be destroyed, so as to prevent the remainder-man or reversioner from re-granting by copy, after the determination of the particular interest in the manor. So a lease for years of an

of the tenancy, all the seigniory is gone, 6 Co. 1 b, in *Bruerton's* case.

(16) Co. Cop. s. 34. Tr. 72.; and see *Curtis* & *Cottel's* case, 2 Leo. 72.

(17) *Ante*, n. (13). And in the instance of a feoffment on condition, the copyhold interest will not revive on entry for the condition broken. 4 Co. 31. a *Ante*, p. 117, 118.

But acceptance of the office of bailiff of the manor will not extinguish the copyhold interest, *Gybson* & *Searl*, Cro. Jac. 176. Nor will the acceptance by a lessee for years of a manor, of the office of steward for life, be a merger of the term, ib. cites *Sir Valentine Brown's* case.

escheated copyhold, the lessor having a limited interest only in the manor, will destroy the custom to re-grant by copy, to the extent only of such limited interest (18).

It is to be recollected that the law of extinguishment is perfectly distinct from that of *merger*, which latter doctrine, however, is equally applicable to copyhold tenure. In the case of *Dove* v. *Williot* (19), A. tenant for life, and B. remainder-man in fee of a copyhold, joined in a surrender to the the use of B. in fee, and it was held that a lease previously granted by B. was good, even in the life of A.; and that by the surrender of the tenant for life to the use of him in the remainder, his estate was drowned in the fee and as it were extinct, and could not hinder the lease to have operation; and the court thus illustrated the point, "as if he in the re- "mainder grants a rent charge, and after the "tenant for life doth surrender, the rent shall "commence presently."

(18) *Conesbie* v. *Rusky*, Cro. Eliz. 459. b. 2 Roll. Abr. 271. *Ante*, p. 19, 119.

It was lately decided that the surrender of a lease for lives of a manor, to the reversioner in fee, did not affect an interest derived under the title of such lease, *Doe* d. *Beadon* v. *Pyke*, 5 Maul. & Selw. 146. And see Co. Litt. 338. b. Shep. Touch. 300. *Davenport's* case, 8 Co. 145. b.

(19) Cro. Eliz. 160. And see S. C. somewhat differently reported, 1 Leo. 174. Vide also Preston on Merger. 538.

SECONDLY, OF ENFRANCHISEMENT.

An enfranchisement is a conversion of copyhold into freehold tenure, by a common-law conveyance of the fee simple of the particular tenement (20), from the lord to the copyholder (21); or by a release from the lord, seized of the manor in fee simple, to the copyhold tenant, of all seignioral rights, whereby the lands are thenceforth held immediately of the lord paramount (22).

But it should seem that if a copyholder be enfeoffed by the lord to the use of others, the copyhold interest will be preserved by the saving of the Stat. of Uses, 27 H. 8. c. 10. s. 3. (23.)

When the lord has only a limited interest in the manor, he is, of course, precluded from carrying a treaty of enfranchisement into complete

(20) A conveyance of the whole manor, would be an extinguishment of the copyhold interest, and not an enfranchisement. *Ante*, n. 13.

(21) A conveyance by a stranger, to whom the lord had previously conveyed the freehold, is equally an enfranchisement, as a conveyance *immediately* from the lord to the copyholder. *Lane's* case, 2 Co. 16. b. &c. *ante*, n. 13.

(22) 2 Inst. 502-4. Co. Litt. 102. b, 280. a. 1 Watk. on Cop. 366-7, refers also to Coke's 5th reading on fines. As copyholds are capable of enlargement by release, the copyhold interest, after such release, becomes merged in the freehold. Co. Litt. 270. b. *Sammes's* case, 13 Co. 55. And see *Doe* & *Huntington*, 4 East, 271. On the effect of a grant to a copyholder of part of the seignioral rights, see *Fawlkner* v. *Fawlkner*, 1 Vern. 21. *Doe* & *Huntington*, *sup.*

(23) *Ised's* case, cited 7 Co. 38. a.

effect; and as we have seen that the acceptance of a conveyance of a portion only of the freehold interest, would operate as a merger of the whole of the copyhold, the two estates being incompatible, it behoves every copyholder, who is desirous of enfranchising his estate, to satisfy himself that the lord, *pro tempore*, is seized of the manor for an estate in fee simple, or, at all events, that a power has been reserved to him, to grant the freehold and inheritance of the copyhold tenement.

It would seem to be settled that a contract for the sale of an estate as freehold, which turns out to be copyhold, cannot be enforced in equity (24), should the vendor not be able to procure an enfranchisement: but the case of *Hick* v. *Phillips* (25) is not considered as an authority against the aid of equity, under an offer to obtain an enfranchisement of a copyhold estate sold as freehold, the decree in that case appearing to have been induced by the unreasonableness of the price (26).

The conveyance by way of enfranchisement should always be taken in the name of the copyholder, and not to a trustee, or the copyhold interest will still subsist (27), so that the wife of the

(24) *Twining* v. *Morrice*, 2 Bro. Ch. Rep. 330. [Belt's Ed.] Sugden's Vend. & Purch. (5th Ed.) 253. *Ante*, p. 262-3.

(25) Pre. Ch. 575.

(26) 10 Mod. 504. Sugd. *ut sup.*

(27) *Howard* v. *Bartlet*, Hob. 181. *Walter* & *Bartlett*, 2 Roll. Rep. 178. *Waldoe* v.

copyholder, if dowable by the custom, would remain so, and the heir be entitled to recover in ejectment, against the purchaser of the freehold interest from his ancestor, who would be driven to equity for relief. This relief was sought in *Dancer* v. *Evett* (28), in which a demurrer to a bill of review to reverse the decree against the heir of the copyholder, was allowed:—particular attention should be given to this point, in the frequent instances of enfranchisements under powers in marriage settlements, where, if the freehold be limited to a trustee (for the copyholder) and his heirs, to uses to bar dower, the legal inheritance of the freehold would vest in the trustee by the appointment, and the copyhold interest, therefore, would not unite with it.

An enfranchisement by a person having a limited interest only in a copyhold estate, is an absolute enfranchisement for the benefit of those intitled in remainder, and this principle, I conceive, would apply to the case of an enfranchisement by a husband, seized in right of his wife (29);

Bertlet, Cro. Jac. 573. S. C. Palm. 111. *Lashmer* v. *Avery,* Cro. Jac. 176. And see *Murrel* v. *Smith,* 4 Co. 24. b.

(28) 1 Vern. 392.; and see *Croft* v. *Lyster,* cited 2 Vern. 164.

(29) In a case of this nature on which I was consulted, and where the wife died intestate leaving issue one son only, heir both to her and the husband, and the son afterwards died intestate and without issue, I inclined to think that the copyhold interest would be held to have merged in the freehold, for the benefit of the heir *ex parte paterna.* Vide *Anon.* Cro. Eliz. 7. *Stockbridge's case,* Cro. Eliz. 24.

and the devisee or heir of the person so enfranchising, will be decreed in equity to convey the legal freehold, on payment of a due proportion of the consideration for such enfranchisement (30).

If a copyhold estate be enfranchised by a tenant in tail, the issue in tail will be barred: this was adjudged in *Parker* v. *Turner* (31), where tenant in tail, with remainder to himself in fee, having enfranchised and sold, the Lord Chancellor held, that the purchase of the freehold attracted the copyhold interest, and that the purchaser should hold against the issue in tail.

The remainder-men are also barred by the enfranchisement of the tenant in tail in possession, see *Challoner* v. *Murhall* (32), which case has been thought to have gone a step beyond the principle of *Parker* & *Turner*, and others of that class, and to have decided that the union of the estate of the lord, with that of the copyholder for life, will be sufficient in equity to destroy the estate tail, and all other remainders over; but this, I submit, is a very erroneous deduction from the authority of the case in question, for it is observable, that there was a union of the inhe-

Croft & *Lyster*, cited 2 Vern. 164. See also Preston on Merger, p. 548.

(30) *Wynne* v. *Cookes*, 1 Bro. Ch. Rep. 515. *Roe* d. *Clemett* v. *Briggs*, 16 East, 415.

(31) 1 Vern. 393, 458. S.C. (*Barker* v. *Turner*,) 2 Ch. Ca. 174.; see also *Dunn* v. *Green*, 3 P.W. 10. *Challoner* v. *Murhall*, 2 Ves. Jun. 524. 3 Ves. 127-8. 4 East, 283. *Ante*, p. 77. But see *Bernard* v. *Simpson*, Clayt. 138. *Taylor* v. *Shaw*, Cart. 23-4.

(32) Ante, n. 31.

ritance of the freehold and copyhold interests; the fee simple of the freehold, which was granted by the lord of the manor, having descended to the tenant in tail of the copyhold, as the son and heir of the grantee, and the son had disposed of the premises by his will as freehold; and this descent and disposition, I conceive, alone influenced the Chancellor's decision; for I cannot imagine, that a court of equity would allow an enfranchisement by a tenant for life, to be not only for the benefit of all interested in the estate, as in *Wynne* & *Cookes*, but to operate as a bar to the estates tail in remainder, without the privity or concurrence of the first tenant in tail. The above peculiar distinctions in the case of *Challoner* & *Murhall*, appear to have occurred to the late Mr. Serjeant Hill, according to a MSS. note which I have found among some valuable relics of that learned gentleman, now in my possession.

The right of common in the waste of the lord within the manor, is extinguished by enfranchisement (33), unless specially preserved to the co-

(33) *Bradshaw* v. *Eyr*, Cro. Eliz. 570. *Worledg* v. *Kingswel*, *ib.* 794. S.C. 2 And. 168. *Fort* v. *Ward*, Mo. 667. *Marsham* v. *Hunter*, Cro. Jac. 253. S.C. 1 Bulst. 2. S.C. (called *Massam* v. *Hunter*,) Yelv. 189. S.C. (called *Darson* v. *Hunter*,) Noy. 136. S.C. *Massam* v. *Hunt*,) 1 Brownl. 220, (*Marsam* v. *Hunter*,) 2 *ib.* 209. *Grymes* v. *Peacock*, 1 Bulst. 18. *Tyrringham's* case, 4 Co. 38. a. Co. Litt. 122. a. *Styant* v. *Staker*, 2 Vern. 250. *Speaker* v. *Styant*, Comb. 127. *Crowther* v. *Oldfield*, 1 Salk. 170, 366. S.C. Holt, 146. S.C. 6 Mod. 20. Com. Dig. Cop. (K. 6.) Gilb. Ten. 224. *Barwick* v. *Mathews*, 5 Taunt. 375. S.C. 1 Marsh, 50. *Ante*, tit. Prescription.'

pyholder under terms, equivalent to a re-grant of common (34); and it has been held, that the grant of all *appurtenances* to the copyhold tenement, will not prevent the destruction of the common (35): it is therefore usual to insert a re-grant of the commonable rights in the deed of enfranchisement.

And a power to that effect should be given to the trustees, in addition to the usual power of enfranchising, in marriage settlements.

But although the right of common would be destroyed at law, it will subsist in equity (36).

And it has been adjudged, that common in the waste of the lord out of the manor, is not lost by enfranchisement, for the copyholder hath it as belonging to his land, and not to his estate (37): and also that if a copyholder hath had immemorially a right of way over another's copyhold,

(34) *Speaker* v. *Styant*, Comb. 127.

(35) *Bradshaw* v. *Eyr*, *Marsham* & *Hunter*, and *Styant* & *Staker*, *ubi sup.* Gilb. Ten. 224. *Lee* v. *Edwards*, 1 Brownl. 173.

(36) *Styant* & *Staker*, *sup.*

In the case of *Lady Lanesborough*, Appel. and *Ockshott*, Resp. 1 Br. P. C. 151, the lord had entered into an agreement with his copyhold tenants for inclosing part of a common; the tenants released their right of common, and the lord his quit rents and services: the inclosure did not take effect, and the tenants continued to enjoy their right of common, and the lord to receive his rents and services. The agreement was held to be waived, and the releases decreed to be cancelled.

(37) *Grymes* & *Peacock*, *Tyrringham's* case, *Crowther* & *Oldfield*, *Barwick* & *Mathews*, *ante*, (n. 33). Co. Litt. 122 a, 149. a. Com. Dig. Cop. (K. 6.) *Revell* & *others* v. *Jodrell*, 2 T. R. 415: but see *Leets* & *Edwards*, Hob. 190.

and he purchaseth the inheritance of his own copyhold, yet the way remains (38), as it is the tenure only that is altered by the enfranchisement (39).

In adverting to the subject of a conversion of copyhold tenure into freehold, I think it right to suggest, that when an allotment is made to a copyholder, of waste or other freehold land, under an act of Parliament, not containing a provision that the allotted land shall be held by the same tenure as the estate in respect whereof the allotment is made, no change of tenure will take place in the land so allotted (40); and that a copyholder would probably, therefore, in a case of that nature, be deemed to have a right to vote at an election, in respect of such freehold allotment (41).

(38) *Empson & Williamson,* 1 Roll. Abr. 933. Lex. Cust. 233. 1 New Abr. 482. And see *Simpson* v. *Telwright,* 2 Lutw. 1248, where the lessee of a coal mine claimed a right of way over a copyhold of inheritance, as a consequence of an enfranchisement made by the copyholder subsequently to the demise of the mine, but the case stood over for further argument, and the matter was compromised. It did not clearly appear that there was a way of necessity over the copyhold at the time of the demise. See Calth. 97. Lex. Cust. 226. *Ante,* p. 485.

(39) See *Rich* v. *Barker,* Hard. 131. See also Preston on Merger, p. 548.

(40) See *Doe* d. *Lowes* v. *Davidson,* 2 Man. & Selw. 175. *Ante,* p. 25. et seq.

(41) Mr. Rogers in his 'Law and Practice of Elections,' in discussing the right of voting in respect of fee farm rents and rents charge, observes, that all such rents are considered freehold, and give a right to vote, although, as it should seem, they issue out of lands in right of which the proprietor could not vote; and he adds the following note. "In some cases, the nature of

Since the statute of *quia emptores*, 18 Ed. I. the services rendered by a copyholder to the lord, cannot be reserved on an enfranchisement, which is a conveyance away of the reversionary estate, in respect of which those services were due, but after such enfranchisement, the estate will become frank-fee and be held of the superior lord, and if a rent be reserved on a grant of the freehold, it will be a rent upon contract, and not a rent service (42).

And yet it has been said, that if the ancient rent or relief were excepted out of the grant, it would continue as the remnant of the ancient seigniory (43), *sed quære?*

An enfranchisement will be presumed, even

" the estate itself does not admit " of its owner having a freehold " tenure in it; therefore a man " cannot vote for the advowson " of a Church, or for common " of pasture; but for the free " warrens of conies, the profits " of wood sales, coal mines, " tythes impropriate, or the " like, in which he has an " estate for life, and producing " *communibus annis* 40*s.* by the " year, he is entitled to vote. " Tythes of copyhold lands " have been held to give a " right to vote; at the last " York election, a person ten- " dered his vote for an allot- " ment of common made to a " copyhold estate, and it was " allowed."

And on the subject of the exclusion of copyholders from the right of voting at elections, Vide the 2d part of this treatise, tit. "CUSTOMARY FREEHOLDS."

(42) *Bradshaw* v. *Lawson*, 4 T.R. 443. *Doe* d. *Reay* v. *Huntington and others*, 4 East, 271, 290.; and see *Griffith* v. *Clarke*, Mo. 143-4. *Chetwode* v. *Crew and others*, Willes, 614. 7 Taunt. 618 in *Moore* v. *Lord Plymouth*.

(43) *Doe* & *Huntington*, and *Griffith* & *Clarke*, *sup.*

against the Crown, to support a very long possession: this was decided in *Roe* d. *Johnson* v. *Ireland* (44), where the question for the opinion of the court was, whether the judge ought not to have left it to the jury upon the evidence, to have presumed an enfranchisement by the Crown, although the manor was out on lease from 1636 to 1804: the last act on the rolls of the manor was in 1636; no mention appeared in the entries on the rolls of the rent, but there was evidence that 6*s.* 6*d.* was the old copyhold rent; and in a parliamentary survey in 1649, in the column of freehold rents, the churchwardens to whom the tenements were surrendered in 1636, were marked 6*d.* And Lord Ellenborough, observing on the high estimation in which the survey stood for its accuracy, held, that this was evidence to go to the jury, to prove that the estate was freehold, and expressed his inclination to presume any thing capable of being presumed, to support an enjoyment for so long a period (45).

(44) 11 East, 280. And see *Steward* v. *Bridger*, 2 Vern. 516-17, where a grant of the freehold was presumed after 20 years.

(45) *Vide* also 6 T. R. 398.; and *the Mayor of Kingston-upon-Hull* v. *Horner*, Cowp. 102, where a grant or charter was presumed against the Crown, upon a possession of 350 years.

END OF THE FIRST PART.

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PART I

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